TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~342~~ 34.

FRED HEWITT, PLAINTIFF IN ERROR,

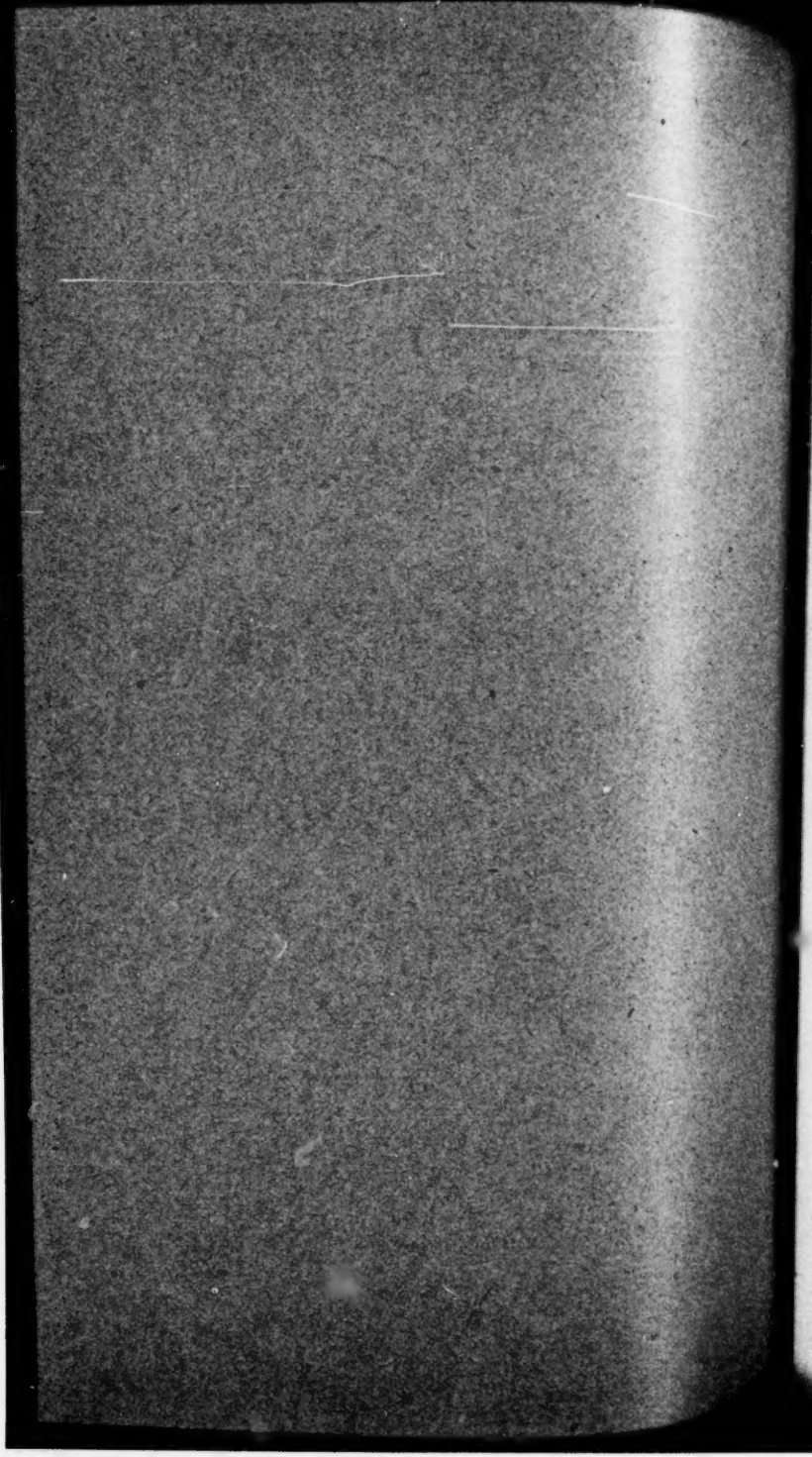
vs.

EMIL SCHULTZ AND FRIEDERIKA SCHULTZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED MARCH 26, 1900.

(17,336.)



(17,336.)

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EMIL SCHULTZ AND FRIEDERIKA SCHULTZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Citation and service	*b*	1
Caption	1	2
Transcript from district court	2	2
Summons	2	2
Complaint	3	3
Answer	5	4
Reply	40	24
Stipulation as to facts	48	29
Findings of fact	74	44
Conclusions of law	98	60
Order allowing exceptions	99	60
Order for stay	100	61
Exceptions to findings of fact and conclusions of law	101	61
Judgment	103	62
Stipulation as to statement of case	105	63

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	Original.	Print
Statement of case	106	63
Stipulation as to facts	107	64
Exceptions to findings of fact and conclusions of law	132	79
Specification of errors	133	80
Judge's certificate to statement of case	135	81
Notice of appeal	136	82
Bond on appeal	136	82
Specification of errors	139	83
Hearing and submission	142	85
Judgment	143	85
Opinion	145	86
Petition for writ of error	155	92
Assignment of errors	156	92
Bond on writ of error	159	94
Clerk's certificate	161	95

a UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable supreme court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Dakota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between Fred Hewitt, plaintiff, and Emil Schultz and Friederika Schultz, defendants, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath happened, to the great damage of the said Fred Hewitt, as by his complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 10th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of Circuit Court of the United States,
District of North Dakota.

The above writ is hereby allowed.

J. M. BARTHOLOMEW,
Chief Justice of Supreme Court of North Dakota.

Filed Jan. 23, 1899.

R. D. HOSKINS, *Clerk.*

b United States of America to Emil Schultz and Friederika Schultz, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of North Dakota, wherein Fred Hewitt is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ

mentioned, should not be corrected and speedy justice not be done in that behalf.

Witness the Honorable J. M. Bartholomew, chief justice of the supreme court of the State of North Dakota, this 10th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of North Dakota.

Due service of the above citation is hereby admitted this 17th day of January, A. D. 1899.

JAMES B. KERR,
BALL, WATSON & MACLAY,
Attorneys for Defendants in Error.

Filed Jan. 23, 1899.

R. D. HOSKINS, *Clerk.*

1 STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance to the foregoing writ of error, do hereby certify that on the 19th day of March, 1898, there was filed in said office a record on appeal from the district court of the county of Sargent, in the State of North Dakota, wherein Fred Hewitt was respondent and Emil Schultz and Friederika Schultz were appellants; which record was in words and figures as follows, to wit:

2 STATE OF NORTH DAKOTA, } *ss:*
County of Sargent, }

District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
against
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants.

The State of North Dakota to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, of which a copy is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Lisbon, in said county and State, within thirty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated July 10th, 1895.

THOMAS A. CURTIS,
Plaintiff's Attorney, Lisbon, North Dakota.

3 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

The plaintiff complains and alleges:

I.

That on the 10th day of July, 1882, plaintiff was possessed and ever since the 28th day of March, 1883, has been the owner in fee-simple and possessed and entitled to the possession of that certain tract of land, situated, lying, and being in the county of Sargent and the State of North Dakota, described as follows, to wit:

The northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred thirty-two (132) north of range numbered fifty-seven (57) west of the 5th principal meridian.

II.

That while the plaintiff was so seized the defendants, afterwards and on or about the 18th day of December, 1889, and without right or title, unlawfully entered into possession of said demanded premises and ousted and ejected plaintiff therefrom, and now unlawfully with-old the possession thereof from this plaintiff, to his damage in the sum of three hundred dollars ($300.00).

III.

That the value of the rents, issues, and profits of said premises from the said 18th day of December, 1889, and while the plaintiff has been so excluded therefrom by the defendants, is the sum of seven hundred fifty dollars ($750.00).

IV.

That plaintiff has demanded and caused to be demanded
4 of defendant the possession of said premises previous to the commencement of this action.

Wherefore the plaintiff prays judgment against defendants:

1. For the recovery of the possession of the said premises and for the sum of three hundred dollars ($300.00) damages for withholding the possession thereof.

2. For the sum of seven hundred fifty dollars ($750), the value of said rents, issues, and profits.

3. For the costs and disbursements of this action.

Dated Lisbon, N. D., July 10, 1895.

(Signed) THOMAS A. CURTIS,
Plaintiff's Attorney, Lisbon, N. D.

5 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

Answer.

The defendants, answering unto the matters and things set forth and alleged in the plaintiff's complaint herein, allege and aver as follows:

First. They deny each and every allegation in the first, second, and third paragraphs of the plaintiff's complaint herein, except that the said defendants admit that they are now in possession of said described land.

And for a further answer unto the matters and things set forth and charged in the plaintiff's complaint, and as an equitable defense and counter-claim thereunto, the said defendants allege and aver as follows, to wit:

1. That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior
6 in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved,

sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

"Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States, and patents of lands, as aforesaid, should be issued to said company confirming to said company the right and title to said lands situated opposite to and conterminous with said completed sections of said road, and that whenever from time to time twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided that the President of the United States should cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route thereof was fixed and as fast as might be required by the construction of said road, and that the odd-numbered sections of land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed except by said company.

2. That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof in writing under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the President of the United States.

3. That thereafter, by a joint resolution approved May 31, 1870,

entitled "A resolution of Congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages, and for other purposes," it was resolved and provided that, in the event of there not being in any State or Territory in which said main line or branch might be located at the time of the final location thereof the amount of lands granted by said act to said company within the limits prescribed by its charter, the said company should be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency on said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of said act of July 2, 1864.

4. That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located that portion of the line of its said railroad extending from the
9 Red River of the North to the Missouri river, in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26th, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., 26 *May*, 1873.

"SIR: I transmit herewith for appropriate actions map of the definite location of the Dakota division of the Northern Pacific railroad between the Red and Missouri rivers, received on the 24th instant, with letter of same date from W. K. Mendenhall, Esq., att'y for the Co. in this city.

"Very respectfully, your ob't servant,
"C. DELANO, *Secretary.*

"Hon. Willis Drummond, Com'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office; that upon the filing of said map or plat the said Commissioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with said line, as shown on said plat, namely, forty (40) and fifty (50) the mile limits on each side of said line of definite location, the first named being the lands in place, and hereafter, for the purpose of

convenience, being designated the place lands, the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands. Thereafter the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which the said line of definite location extended and within which such place and indemnity lands fell, a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 11th*, 1873.

"Register and receiver, Pembina, D. T.

"GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26 ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river, in Dakota Ty. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits and $1.25 per acre between the forty and fifty mile or indemnity limits.

"The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

"The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even sections become double minimum.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, W. W. CURTIS,
Acting Commissioner."

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district in which said lands were situate, June 24, 1873.

The said northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth (5th) principal meridian, North Dakota, was coterminous with said line of definite location so fixed May 26th, 1873, as aforesaid, and was more than forty (40), but within fifty (50), miles thereof, being within the indemnity limits, and was at the date of said grant, at the time said line was definitely fixed and

the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said order of withdrawal was made, and at the time it was received at the said United States district land office at Pembina, and at all times herein mentioned except as otherwise in this answer set forth, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption and other claims or rights, and was and is non-mineral in character; and defendants further aver that the said land was from and after the definite location of said line of railroad coterminous therewith, and from and after said order of withdrawal was made reserved from sale or location, homestead or pre-emption entry except by said railroad company.

5. That prior to the year 1885 said Northern Pacific Railroad Company definitely located the line of its said railroad from a point on Lake Superior, in the State of Wisconsin, westerly through the State of Minnesota and the Territories of Dakota, Montana, Idaho, and Washington to Wallula junction, in said Washington, and
12 from Portland, Oregon, to a point on Puget sound, at Tacoma, Washington, and definitely located the branch line of its said railroad from Pasco junction, a point on the said main line in Washington, across the Cascade mountains to said Tacoma, and from time to time, as portions of said main line and branch line were definitely located, duly approved by the Secretary of the Interior, — to be filed in the office of the Commissioner of the General Land Office; that each and every portion of said main line and branch was so definitely fixed and plats thereof filed in the office of the Commissioner of the General Land Office prior to January 1, 1885; that upon the filing of said maps or plats of the line of the railroad so definitely fixed in the office of the Commissioner of the General Land Office the said Commissioner made and designated upon the maps and records of his office the limits of the land granted by the said Congress to said railroad company as defined by said lines of definite location as follows: Coterminous with the portions of said line located in the then Territories of (now States of) North Dakota, Montana, Idaho, and Washington, the forty and fifty mile or place and first indemnity limits; coterminous with the portions of said line located in the State of Oregon, the twenty and thirty mile or place and first indemnity limits; coterminous with the portions of said line in the States of Minnesota and Wisconsin, the twenty, thirty, and forty mile or place, first and second indemnity limits, said second indemnity limits being the limits provided for in said joint resolution approved May 31, 1870; that from time to time, as such limits were so designated and fixed, the said Commissioner, under the directions of the Secretary of the Interior, withdrew the odd-numbered sections of public lands therein from sale or location, pre-emption, or homestead entry.

6. That, as defendants are informed and believe, there were at the time said plats of definite location of said line
13 were filed in the office of the Commissioner of the General Land Office, as aforesaid, over twenty-four millions of acres of unsurveyed land within the limits prescribed in said act of July

2, 1864, and included within what, when surveyed, would be odd-numbered sections, and that the greater portion thereof still remains so unsurveyed; that portions of said lands within the place limits of said grant, both surveyed and unsurveyed, are mineral lands; that other large portions thereof were at the date of the grant, or at the time the line of said railroad coterminous therewith *were* definitely fixed and plats thereof filed in the office of the Commissioner of the General Land Office (and many thereof still are), included within the Indian and military reservations; that still other vast quantities of said lands were at said times and are reserved, sold, granted, and otherwise appropriated or had and have attached thereto pre-emption or other claims or rights, and that when the entire line of said railroad was definitely fixed and the plats thereof filed in the office of the Commissioner of the General Land Office there was not, has not since been, and is not now, within the said indemnity limits prescribed in said act of Congress approved July 2, 1864, sufficient lands, subject to said railroad company's right of selection, to make up to said company the quantity of lands within the place limits of its said grant which are mineral and which were reserved, sold, granted, and otherwise appropriated and to which pre-emption or other claims or rights had attached at the date of the grant or at the time the line of said road opposite thereto was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office and in lieu of which said company was entitled to obtain other lands or to make up, together with the lands in the place limits, the quantity of lands granted to said company by said act of July 2, 1864; and defendants
14 further aver upon information and belief that if said railroad company had received and should receive all the lands in said indemnity limits subject to its right of selection that said lands would lack over three million acres of being sufficient to indemnify said company for the lands within the place limits excepted from its said grant in lieu of which it was and is authorized to obtain lands within said indemnity limits.

7. That said Northern Pacific Railroad Company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location extending from Lake Superior to Puget sound, as aforesaid (both main and branch lines), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines equal or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress of July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to No-

vember, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commissioners so examined it, and on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of the said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the said Secretary of the Interior transmitted said report to the President of the United States with the following recommendation: "The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same and the issuance to the company of patents for lands due on account of the completion thereof." That said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

8. On May 17, 1883, in response to a letter from the Commissioner of the General Land Office stating as follows:

"That it has been the uniform practice as to all grants having indemnity provisions, including that of the Northern Pacific railroad, to withdraw from entry and sale the indemnity as well as the granted lands. It has been the rule, where the maps showing the definite location of a road have been presented to the department, to refer the same to this office without comment for appropriate action, * * * and the withdrawals have followed as a matter of course and without specific authority from the department."

And asking instructions upon the following points, to wit:

"Whether I shall direct the local officers to withdraw from entry and settlement the odd sections within the indemnity limits of the Northern Pacific railroad, or whether I shall only mark the outer lines of said indemnity limits, beyond which the railroad company cannot go, and hold the lands in such limits open to the first legal applicant."

The Secretary of the Interior ruled, among other things, as follows:

"The grant to the Northern Pacific does not provide, either specifically or in general terms, for an executive withdrawal of lands within either granted or indemnity limits.

"The power of the executive department of the Government, however, to withdraw lands for the benefit of the grant, within the granted limits, without any direction expressed in the act, is now too well settled to be questioned (8 Att'y Gen'l Opin., 244; Wolcott *vs.* Des Moines, 5 Wall., 681; Woolsey *vs.* Chapman, 101 U. S., 755).

"Such power has been recognized by Congress (10 Stat., 269) and has been exercised by the Land Department for a long time before the Northern Pacific act was passed, and must have been well understood by Congress at the time of the passage of that act.

"This department has held that it had such authority in the case of the Northern Pacific grant (Copp's P. L. L., 377).

"The object of the withdrawal is to prevent private appropria-

tion of the granted lands, which would defeat the object of the grant (5 Wall., 688, *supra*). By parity of reasoning the authority to withdraw lands within the indemnity limits must follow. Such authority has been repeatedly exercised by the Land Department in reference to the Northern Pacific and other indemnity lands. * * *

"I am convinced that the persuasive force of the acts passed for the Northern Pacific require such withdrawal to be made as will place beyond reasonable doubt any possibility of the miscarriage of their evident intent with respect to its lands.

"The intention of the legislature, as manifest in these land-grant acts, must in good faith be carried out by the Land Department. * * *

"It was clearly the intention of the legislature that within the indemnity limits fixed by the Northern Pacific acts the
17 company should have the opportunity to take lands, acre for acre, for all those lost in place.

"A considerable portion of the road has already been built, the remainder is in rapid progress of construction, and the entire road will probably be completed at an early day. The work of ascertaining what lands have been lost to the company ought to go forward as rapidly as possible, and the company be enjoined to make selections in lieu of such lost lands without delay.

"In reply to your suggestion whether 'the withdrawals in the indemnity limits of this grant are to stand as far as made,' I have to say that I am of the opinion that such withdrawals should, at least for the present, be maintained.

"I am further of the opinion that, upon filing maps of approved definite location, withdrawals of lands within indemnity limits should be made by you to the extent of the first indemnity limits. Such action will be in accord with the practice heretofore pursued by your office under the grant in question."

And for greater particularity defendants beg leave to refer to the full text of said decision as published in the third volume of the Decisions of the Department of the Interior Relating to Public Lands, beginning at page 511 thereof.

And defendants allege and aver that by the decisions of the Secretary of the Interior in making the orders of withdrawal hereinbefore set out, and by the said decisions last referred to, the question of the right and authority of the Secretary of the Interior to so withdraw and reserve the lands within the limits of said Northern Pacific Railroad grant was finally determined and adjudicated, and such question became and was in the Interior Department of the United State *res adjudicata*, and was not subject to review by, but was and is binding upon the successors of the said officers of the In-
18 terior Department and their subordinates.

That thereafter, to wit, May 26, 1883, the Commissioner of the General Land Office, under the said direction of the Secretary of the Interior, issued to the registers and receivers of the United States district land offices for the land districts with- which the lands coterminous with the Northern Pacific line and within the limits

of its grant were located a circular of instructions, in which, among other things, he directed said district land officers as follows:

"The Secretary's decision being applicable to all withdrawals for indemnity purposes under railroad grants, you are directed to refuse applications for land thus withdrawn, except where the applicant alleges settlement prior to the date of the receipt of the order of withdrawal at the local office." That said circular of instructions was received in due course of mail at the United States district land office at Fargo, North Dakota, that being the district in which the said northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, was then and at all times since has been situated; that on May 28th, 1883, the Secretary of the Interior issued the following instructions to the Commissioner of the General Land Office:

"SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in place within the granted limits. The grant should be adjusted at the earliest possible time that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th inst. The unparalleled demand for lands for actual settlement by great numbers of persons, not only from
19 foreign countries, but from the older States, seeking homes, under the settlement laws, along the line in the vicinity of the Northern Pacific grant, requires, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company. In order to facilitate the work of making selections, I think you should instruct the land officers that when clear lists of selections free from conflict or other objection are filed with the district officers and approved by them, said selection should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of lands lost in place to your office instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore. I am satisfied that the work of adjusting the grants will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Sec.*"

And thereafter the said Commissioner of the General Land Office duly instructed the registers and receivers of the United States district land offices as required by said Secretary's letter of May 28, 1883.

9. Defendants further allege and aver that in the spring of 1883 the said Northern Pacific Railroad Company, by its duly authorized agent, prepared a list of lands within its indemnity limits coterminous with the portion of its said line extending from the Red River of the North to the Missouri river, and duly applied to select said lands as indemnity in lieu of lands excluded from its grant and for

which it was entitled to take indemnity by tendering said list, together with all fees prescribed by law and the regulations of the Interior Department, to the register and receiver of the United
20 States district land office for the district of lands for sale at Fargo, Dakota Territory, that being the district in which the lands in said list were situated; that among other lands described in said list was the said northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, Territory of Dakota, now State of North Dakota; that said list was due and regular in form, complying therein with the directions of the Secretary of the Interior; that on April 9th, 1883, said list was accepted and filed by the register and receiver of said United States district land office at Fargo, Dakota Territory, who, pursuant to the directions of the Secretary of the Interior, indorsed thereon their certificate of acceptance of approval in the words and figures following, to wit:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April 9th*, 1883.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct, and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of fifty miles on each side, and that the same are not nor is any part thereof returned and denominated as mineral lands nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file and of record in this office.

"We further certify that the foregoing list shows an as-
21 sessment of the fees payable to us allowed by the act of Congress approved July —, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to the registers and receivers of the general land offices, and that the said company have paid to the receiver on March 19, 1883, the full sum of $5,487.29 in full payment and discharge of said fees.

"HORACE AUSTIN, *Register*.
"E. C. GEAREY, *Receiver*."

That the aggregate area of the lands described in said list was four hundred and thirty-eight thousand nine hundred and ninety-one and ninety one-hundredths (438,991.90) acres.

That the losses in lieu of which said railroad company applied to select the lands described in said list were not nor was any thereof designated and set forth in said list.

That after the filing of said list it was, in accordance with the rules of practice of the Interior Department, transmitted to the office of the Commissioner of the General Land Office for examination and approval.

That after the filing of said selection list, as hereinbefore set forth, to wit, August 4, 1885, the Commissioner of the General Land Office, acting under the instructions of the Secretary of the Interior, issued the following circular of instructions governing the manner of making indemnity selections:

"Railroad indemnity selections.

"*Circular.*

"Acting Commissioner Walker to registers and receivers.

"AUGUST 4, 1885.

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then
22 carefully examine your records, tract by tract, to ascertain whether the loss actually exists as alleged. You will admit no indemnity selections without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions and not place the selections upon record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

"The selection agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated lands within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved:

"L. Q. C. LAMAR, *Secretary.*"

The said circular had no application to grants where the indemnity lands were not sufficient in quantity to indemnify the losses, as was the case with the Northern Pacific grant.

That, Aug. 15, 1887, the Secretary of the Interior, after finding and reporting to the President of the United States that there was not sufficient indemnity lands subject to said railroad company's right of selection in the States of Wisconsin and Minnesota to in-

demnify it for losses from its grant in said States, and after
23 refusing to ascertain and determine whether or not there were sufficient lands within the entire indemnity limits of the said Northern Pacific Railroad Company's grant to indemnify it for all losses from its said grant, made an order attempting and purporting to revoke all the withdrawals of indemnity lands made for the benefit of your petitioner. Said order provided, among other things, as follows:

"As to the lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers whenever such application to file or enter is presented alleging upon sufficient *prima facie* showing that the land is from any cause not subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of such filing or entry. Should the company fail to respond or show cause before the local officers why the application should not be allowed, said application for filing or entry will be admitted and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rule of practice to determine whether said land is subject to the right of the company to make selection of the same, which shall be determined by the register and receiver subject to the right of appeal in either party."

The defendants allege and aver that said order purporting to revoke said withdrawals and to leave the lands within the indemnity limits of said railroad company's grant subject to entry by settlers under the public land laws of the United States was made without
authority; that by reason of the deficiency in said railroad
24 company's grant, all of the vacant indemnity lands within the indemnity limits were appropriated for the benefit of said railroad company, and there was no necessity for the exercise of the judgment of the department in selecting from said indemnity lands, and said lands were, by virtue of said act of Congress approved July 2, 1864, and said joint resolution of May 31, 1870, reserved and appropriated for the benefit of said Northern Pacific Railroad Company; that the said Secretary further directed in his said order last above referred to that no filings or entries of the lands embraced therein should be received until after giving notice of the same by public advertisement for the period of thirty days; that according to the terms of said order the lands included within the Fargo land district, in Dakota Territory, were not subject to be filed upon or entered prior to October 15, 1887, that being the expiration of the thirty days' published notice.

12. That, October 12, 1887, the said Northern Pacific Railroad Company, for the purpose of complying with the terms and provisions of said circular of August 4, 1885, hereinbefore set forth, although said circular was not applicable to said grant, filed in the United States district land office at Fargo, North Dakota, a certain

list wherein it designated the losses in lieu of which it had applied to select lands described in its said selection list filed April 9, 1883, as hereinbefore set forth; that Exhibit "A" hereunto attached is a true and correct copy of said list as filed, omitting therefrom many of the land descriptions; that the 7,900.78 acres included in said list filed April 9, 1883, but marked as "stricken out" in said list filed October 12, 1887, were included in a certain other supplemental list filed in said United States district land office at Fargo, October 12, 1887, in connection with a list of losses in lieu of which said lands were selected; that the said lands designated as lost lands in said Fargo list No. 6, filed
25 October 12, 1887, as hereinbefore set forth, were lands coterminous with the line of said Northern Pacific Railroad Company and within the place limits of the grant thereto; that many of said losses were situate in States other than Dakota; that said lands and each and all thereof were reserved, sold, granted, and otherwise appropriated or had attached thereto pre-emptions or other claims or rights at the time the line of said Northern Pacific railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and was thereby excluded from the grant to said Northern Pacific Railroad Company, and said company became entitled to indemnity therefor; that the said list of losses filed October 12, 1887, as aforesaid, was prepared in the manner and form required by the instructions of the Secretary of the Interior, and selection list prepared in such manner and form were repeatedly approved by the Secretary of the Interior; that since the filing of said lists, to wit, March 30, 1891, the Secretary of the Interior approved for patent 283,125.95 acres of the lands selected, as aforesaid, in said Fargo list No. 6, and in lieu of 283,110 & $\frac{87}{100}$ acres of the losses designated October 12, 1887, in said Fargo list No. 6, as aforesaid, and thereafter, to wit, on the — of ——, 1891, said lands were duly conveyed to said Northern Pacific Railroad Company by letters patent issued under the great seal of the United States.

13. That afterwards, to wit, July 1, 1890, the Secretary of the Interior, in a certain contest pending before the Department of the Interior between the Northern Pacific Railroad Company and John O. Miller, held and determined as follows:

"The claim of the Northern Pacific Railroad Company to a right to select the tract involved is based upon the third section of
26 its granting act (July 2, 1864, 13 Stats., 365), which provides that whenever prior to the definite location of its line of road any of said (granted) sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected in lieu thereof under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said (granted) alternate sections.

"The loss to its grant in the manner prescribed of a tract or tracts of land corresponding to those which it claims as indemnity is, under

the stated provisions of its grant, an essential to the right of the company to so select.

"That such losses should first be shown to the satisfaction of the Land Department is obvious, for otherwise the indemnity claimed therefor could not properly be selected under the 'direction of the Secretary of the Interior,' or, in other words, in accordance with the act of 1864, *supra*.

"By circular approved August 4, 1885 (4 L. D., 90), the various local officers were instructed as follows:

"'Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed, and in cases where indemnity selections have heretofore been made without specification of losses you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.'

"The particular loss in lieu of which the Northern Pacific Railroad Company seeks to select the land in question is not shown by the record before me, and I am advised by your office that it has failed to designate the same.

"The said application of the Northern Pacific railroad is accordingly denied."

27 That thereafter, the said Northern Pacific Railroad Company having duly moved for a review of said last above mentioned decision, the said Secretary of the Interior reaffirmed the same and, among other things, held as follows, to wit: "The selection in this instance is not, in my opinion, protected by the order of May 28, 1883, as that order did not contemplate the selection of lands subject to settlement by merely listing the lands without designating the basis, but was intended to be applicable only to such lands as were protected by the withdrawal;" and for the full text of both of said decisions defendants ask leave to refer to the same as printed in volume 11 of the Decisions of the Department of the Interior Relating to the Public Lands, beginning on pages 1 and 428 of said volume respectively; that thereafter the said Secretary of the Interior held and determined that lands which were covered by the executive orders of withdrawal of indemnity land, as was the land here in question, were within the terms of Secretary Teller's order of May 28, 1883, and that no designation of losses was essential to a valid selection of such lands; that the said Northern Pacific Railroad Company, for the purpose of complying with the interpretation placed by the Secretary of the Interior in said last-named decisions in said John O. Miller case upon the circulars of instructions governing the selection of indemnity lands, rearranged the lands theretofore selected in said Fargo indemnity list No. 6 and remaining unpatented and rearranged the losses designated as a basis for the selection of said lands so that said rearranged list would show the specific loss in lieu of which each individual tract of land selected in said list was so selected, and attached to said list a statement in which, after reciting the said previous selection of said lands, the said company set forth and stated as follows, to

wit: "Now, therefore, to comply with the further require-
28 ments of the Interior Department, but not waiving or abandoning any rights or claims heretofore acquired by virtue of its selections heretofore made under the directions of the Secretary of the Interior, the said Northern Pacific Railroad Company has herein designated the lands heretofore selected as indemnity in said Fargo list No. 6, and no other lands, and has herein set opposite each specific description of land so selected the description of the land lost from its grant in place and in lieu of which such indemnity land is selected;" and thereafter, to wit, February 18, 1892, the said railroad company duly filed said rearranged list in the said United States district land office at Fargo, North Dakota; that among the lands described in said rearranged list and which had been described and selected in said list theretofore filed as aforesaid was the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota; that said land, as appeared from said rearranged list, was selected in lieu of the southeast quarter (S. E. ¼) of section twenty-one (21), township forty-four (44) north of range nine (9) west of the fourth principal meridian, Wisconsin, which said land was coterminous with and within twenty miles of the portion of the line of said Northern Pacific railroad, as definitely fixed, extending through the State of Wisconsin, and was at the date of the grant to said Northern Pacific railroad and at the time the line of said railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office aforesaid reserved for and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved July 3, 1856, entitled "An act granting public
lands to the State of Wisconsin to aid in the construction
29 of railroads in said State;" that said land was, because of such reservation and appropriation, excluded from the grant to said Northern Pacific Railroad Company, and said company was then and there entitled to take indemnity in lieu thereof; that after said rearranged list was so filed, as aforesaid, the said register and receiver transmitted the same to the Commissioner of the General Land Office for examination and approval; that, October 14, 1893, the Secretary of the Interior instructed the Commissioner of the General Land Office as follows, to wit: "I have therefore to direct that you call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged, tract for tract, in accordance with departmental requirements, and that all tracts formerly claimed, for which a particular basis has not been assigned in the manner prescribed at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity without regard to such previous claim."

That thereafter, to wit, January —, 1894, the Commissioner of the General Land Office called upon said Northern Pacific Railroad

Company, in accordance with such instruction, to revise its indemnity selection lists; that previous to the expiration of six months from the service of said order upon said railroad company all its indemnity selection lists were so revised as to comply with the instructions of the Secretary of the Interior.

14. That, November 2, 1882, the plaintiff, Fred Hewitt, filed a certain paper, purporting to be declaratory statement No. 11747, in the United States district land office at Fargo, North Dakota, wherein and whereby he alleged that he had settled upon the north-
30 east quarter (N. E. ¼) of section thirteen (13), township one hundred and thirty-two (132) north of range fifty-seven (57) west, Dakota, April 10, 1882, and declared his intention to enter the said described land under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States *and* those who have declared their intention to become such citizens; that thereafter, to wit, April 4, 1883, the said plaintiff appeared at the said United States district land office and tendered his final proof showing compliance with the provisions of said acts of Congress entitling him to enter the said described lands and tendered the purchase price thereof; that said final proof was then and there rejected by the register and receiver of the said United States district land office for the reason that said land had been withdrawn for the benefit of the Northern Pacific Railroad Company and was not subject to entry under the provisions of said act of September 4, 1841, and acts of Congress supplemental thereto and amendatory thereof; that thereafter the said Hewitt appealed from said action by the register and receiver of the United States district land office at Fargo, North Dakota, to the Commissioner of the General Land Office, who, on the 5th day of October, 1883, affirmed the said decision of said register and receiver. The said Hewitt did not take at said time any further action with reference to said matter, and did not appeal to the Secretary of the Interior, but thereafter abandoned said land. —— —, 1888, the said Hewitt applied to the Commissioner of the General Land Office for a review of said decision of October 5, 1883, claiming and pretending that he had never received any notice of said decision of the Commissioner of the General Land Office; that, September 25, 1888, the Commissioner of the General Land Office granted
31 said application and rendered his certain decision, which is in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 25, 1888.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of Oct. 5, 1883, affirming your action in rejecting his final proof for N. E. ¼, section 13, town 132 N., range 57 W.

"Said tract is within the 50-mile indemnity limit of the with-

drawal for the benefit of the Northern Pacific R. R. Co. ordered by letter from this office dated June 11, 1873, received at the local office, then at Pembina, June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th of October following. The whole of said section was selected by the agent of the railroad company.

"Mar. 19, 1883, per list No. 6.

"The records here show that Hewitt presented his final pre-emption proof at your office; which was rejected for conflict with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883.

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over 21 years of age, and a qualified pre-emptor July 10, 1882. His improvements consisted of a frame house, 16 x 16 feet; stable, 10 x 12 feet, and 20 acres of ground broken, the
32 value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior, in the case of The Northern Pacific R. R. Co. *vs.* Guilford Miller, it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the 6th section of the granting act, and, being in violation of law and without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad company had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision, and that 60 days will be allowed for appeal.

"The resident attorney for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"*Commissioner.*"

That thereafter the said Northern Pacific Railroad Company duly appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior, on August 11, 1894, made and rendered his certain decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

33 "The Commissioner of the General Land Office."

"SIR: I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼, sec. 13, T. 132 N., R. 57 W., Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D., —), and your office decision is therefore affirmed and the company's selection will be cancelled. Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That thereafter, to wit, July —, 1895, letters patent were duly issued under the great seal of the United States purporting to convey to the said plaintiff, Fred Hewitt, the said northeast quarter (N. E. ¼) of section thirteen (13), township one hundred and thirty-two (132) north of range fifty-seven (57) west, North Dakota.

Defendants allege and aver, however, that said letters patent so issued to the said plaintiff were wrongfully issued under a mistake of law and of fact; that at the time the said Hewitt settled upon and applied to enter the said described land the said land was reserved lands of the United States not subject to settlement or entry under the provisions of said act of September 4, 1841, or the acts of Congress supplemental thereto or amendatory thereof, or under any acts of Congress; that said Hewitt abandoned said land prior to June 21, 1884, and that during all of the time the said
34 plaintiff resided upon said land it was reserved land and not subject to entry under the provisions of the acts of Congress hereinbefore referred to; that prior to the time of the said decision by the Commissioner of the General Land Office and the Secretary of the Interior awarding said land to said plaintiff, it had been selected by said Northern Pacific Railroad Company, and had in equity become the property of said company, and said company was the owner thereof and entitled to a patent therefor; that the said Commissioner of the General Land Office and the said Secretary of the Interior in their said decisions did not ascertain or determine, or attempt to ascertain or determine, the status of said land at the date the line of said Northern Pacific railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, or at

the date said order of withdrawal, made in June, 1873, was made, or at the time said order was filed in the said United States district land office at Pembina; but the officers of the Interior Department, claiming and pretending that said land was not reserved, and that said orders of withdrawal were void, held that said land was subject to settlement and entry at the time the said plaintiff so settled upon and attempted to make entry thereof; that, in fact, the said plaintiff, Hewitt, never resided upon said land at any time when said described land was subject to entry under the pre-emption or homestead laws of the United States.

15. That June 21, 1884, the said defendant, Emil Schultz, believing said Northern Pacific Railroad Company was the owner of and entitled to the said northeast quarter of section thirteen, township one hundred and thirty-two north of range fifty-seven west, Dakota Territory, made and entered into a certain contract in writing with said railroad company, — agreed, in consideration of twelve hun-
35 dred dollars ($1,200), to sell and convey the said described land to said defendant, Emil Schultz, and the said Emil Schultz then and there agreed to purchase the said land from said company and to pay said railroad company therefor; that immediately upon entering into said contract the said defendant, Emil Schultz, established his residence upon the said described land and has since continued to reside thereon and cultivate and improve the same; that the improvements so placed upon said described land by said defendant, Emil Schultz, are of the value of over fourteen hundred dollars ($1,400); that at the time of entering into the said contract with said Northern Pacific Railroad Company the said defendant, Schultz, had no knowledge of any claim to the said described land by the said plaintiff, Hewitt, or by any one adversely to the claim of said Northern Pacific Railroad Company, and had no knowledge of any claims by or on behalf of said plaintiff prior to the year 1894; that the said defendant having paid the said Northern Pacific Railroad Company the consideration agreed by him to be paid to said company for said lands in said contract of sale, as aforesaid, the said company, on or about December 18, 1889, made, executed, and delivered their certain indenture of deed, whereby it conveyed to said defendant, Schultz, the said northeast quarter of section thirteen, township one hundred and thirty-two north of range fifty-seven west, Dakota, and the said defendant, Schultz, then and there became, has since remained, and now is the owner thereof.

That the said plaintiff at all times had full knowledge and actual notice of the reservation and appropriation of said described land for said Northern Pacific Railroad Company and of the selection of said land by said company, as hereinbefore set forth, and knew that said land was the property of said Northern Pacific Railroad Company; that said plaintiff knew, prior to the issuance of said
36 letters patent of the United States purporting to convey said described land to him, that these defendants were the owners of said land and were entitled to have the same conveyed by the said United States to the said Northern Pacific Railroad Company; that said plaintiff, having full knowledge and actual notice of all of said

facts, with the intent to defraud the said Northern Pacific Railroad Company and these defendants and to obtain said land for his own use and benefit and for the use and benefit of others combining and confererating to that end and for that purpose with the said plaintiff, caused and procured the said letters patent of the United States to be issued to said plaintiff; that said Northern Pacific Railroad Company did not do or cause or permit anything whatsoever (except its said conveyance of said land to these defendants) by which its claim, right, title, or interest to or in said described land has been in any act or thing whatsoever — by which their claim, right, title, or interest in or to said described land has been in any manner impaired or defeated; but the said land and each and every part thereof in equity and of right belonged to these defendants, and they ought to have the legal title thereto, if said legal title has not passed to said defendants, by virtue of the facts hereinbefore set forth; that the said plaintiff refuses to convey the said pretended title obtained by him under the letters patent of the United States, as aforesaid, and persists in asserting his said pretended claim to said land against these defendants.

16. That the said defendant, Friederika Schultz, is the wife of the said defendant, Emil Schultz.

Wherefore the defendants pray judgment:

First. That the said land h[illegible]before described be adjusged, decreed, and determined to be the [illegible]nd of and belonging to these defendants, and that they are equitably and legally entitled
37&38 to have and receive the absolute legal title thereto in fee-simple, and that the said plaintiff is not equitably and legally entitled to said land or any part thereof or any interest therein.

Second. That the plaintiff be ordered and decreed to make, execute, and deliver or cause to be made, executed, and delivered to these defendants such good and sufficient, necessary and proper instrument as shall be ordered and selected by the court conveying, releasing, assuring, and confirming to the defendants the full and perfect legal title to the said lands in fee-simple absolute, free of and clear from all and every lien, encumbrance, charge, or act made, done, caused, suffered, or permitted by the said plaintiff or by any person or persons claiming under, through, or by the said plaintiff whereby the claim, right, title, or interest of these defendants or either of them could be impaired.

Third. That until the execution and delivery of such instrument the judgment of the court stand and operate as such conveyance, release, assurance, and affirmation.

Fourth. That the plaintiff and his attorney or attorneys in fact and legal representatives be perpetually, as well as temporarily, and until the final judgment in this action, enjoined and restrained from making, obtaining, or procuring to be made and deed or other conveyance of said land or any part thereof adversely to these defendants or otherwise than to or for said defendants, and from causing, procuring, permitting, or aiding any other person to procure or obtain a conveyance or any conveyance and from conveying,

selling, assigning, or in any manner disposing of said lands or any part thereof or any legal interest therein, and from attempting or endeavoring so to do, and from in any manner charging or incumb-ring said land or any part thereof, and from attempting
39 and endeavoring to do so.

Fifth. That the defendants have such other and further relief as shall be just and equitable and judgment therefor, and for the costs of this action.

F. M. DUDLEY,
Attorney for Defendants.

40 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Reply.

The plaintiff above named, for his reply to the answer and counter-claim of defendants herein, denies each and every allegation, matter, and thing in said answer contained, except such as are hereinafter specifically admitted, qualified, or explained.

Further replying to defendants' answer and counter-claim, plaintiff—

I.

Admits the incorporation of the Northern Pacific Railroad Company substantially as set forth in defendants' answer herein.

II.

Denies that the premises in controversy in this action were ever reserved from sale or location, homestead or pre-emption entry by qualified applicants therefor under the public land laws of the United States, and plaintiff alleges that the pretended withdrawals attempted to be made by the Department of the Interior on the 11th day of June, 1873, and May 17th, 1883, respectively, and all other pretended withdrawals of said department, as to all lands situated within the indemnity limits, so called, of all grants to said Northern Pacific Railroad Company were in violation of law and null and void for the reason and because of the facts that such pretended withdrawals were not made in the manner and
41 form required by law, and also that there was no authority whatever for the withdrawal by said Department of the Interior of said indemnity lands on account of the grants for said company, and also that the said department had no right or authority whatever to withdraw said lands from sale or location, pre-emption or homestead entry.

III.

Plaintiff has no knowledge or information sufficient to form a belief as to the truth of the matters and things set up in paragraph six of the said answer, and therefore denies the same and all thereof.

IV.

Plaintiff has no knowledge or information as to the truth or falsity of the several matters and things alleged in paragraph seven of the said ans-er, and therefore denies the same and every part thereof.

V.

Plaintiff has no knowledge or information as to whether those portions of paragraph eight of said answer purporting to be copies of departmental l tters and circulars are copies of such letters and circulars, and therefore denies that the originals of such letters or circulars were ever issued by the Department of the Interior; and plaintiff further denies each and every other allegation, matter, and thing in said paragraph eight of defendants' answer contained, and specifically denies that the question of the right and authority of the Secretary of the Interior to withdraw and reserve the lands within the limits of said Northern Pacific Railroad grant was finally determined and adjudicated and became *res adjudicata* or could not be reviewed by or was binding upon the successors of the said officers of the Department of the Interior or their subordinates, as claimed in said answer.

42 VI.

Plaintiff further denies that the said railroad company ever prepared a list of lands within its indemnity limits coterminous with the portion of its line extending from the Red River of the North to the Missouri river, and also denies that said company ever applied to select said lands last above mentioned as indemnity lands, and also denies that said company ever did select said lands as indemnity lands or for any purpose, or that the tract of land involved in this action has ever been selected by said company for indemnity purposes or for any purpose.

VII.

Plaintiff further denies each and every allegation, matter, and thing contained on page 18 of defendants' answer except what purports to be a copy of an order or circular issued by the Department of the Interior, and alleges that the said Department of the Interior had full authority and a legal right to revoke said withdrawals and attempted withdrawals and leave the lands within the indemnity limits of said company's grant subject to entry by settlers under the public land laws of the United States; and plaintiff denies that the said Northern Pacific railroad was or is entitled to all of the vacant indemnity lands within the said indemnity limits, or that all of said indemnity lands were appropriated for the benefit of the said com-

pany by the act of Congress approved July 2, 1864, or the joint resolution of Congress of May 31st, 1870, or any other act or resolution of Congress, or that said lands were, by said act of Congress or joint resolution, reserved for the benefit of said company, except to the extent of a sufficient amount thereof to indemnify it for actual losses in the place limits to be selected by said company, as provided by law. Plaintiff further avers that said company has not
43 sustained losses within the place limits of its grant to entitle it to all, but to only a small part, of said indemnity lands, and such small part should have been selected by said company from the whole indemnity lands, under the direction of the Secretary of the Interior, as provided by law; which selection the company has never made, and the pretended selection claimed to have been made by said company in the spring of the year 1883 was not attempted to be made until after this plaintiff had entered upon, made settlement, and had duly filed his declaratory statement for the said northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbeaed one hundred and thirty-two (132) north of range numbered fifty-seven (57) west; that the said pretended selection has never been approved by the Secretary of the Interior, nor was it made under his direction, and is absolutely null and void.

VIII.

Plaintiff has no knowledge or information as to the matters and things in paragraph twelve of defendants' answer, and therefore denies the same and all thereof.

IX.

Plaintiff demurs to all that part of paragraph thirteen of defendants' answer relating to the decision and proceedings of the Department of the Interior in the certain contest case between the Northern Pacific Railroad Company and John O. Miller on the grounds that the said allegations do not state facts sufficient to constitute any defense or counter-claim; and, replying to the residue of said paragraph thirteen, plaintiff denies that the said company rearranged its list of selections as alleged, and further denies that the said northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred and thirty-two (132) north of range numbered fifty-seven (57) west was ever selected by said company in
44 accordance with law, and that if said company ever did make a pretended selection thereof the same was not done under the direction of nor approved by the Secretary of the Interior, and for the reasons hereinbefore mentioned such alleged selection is null and void.

Plaintiff also alleges and avers that the said Northern Pacific Railroad Company was not entitled to take the tract in controversy or any indemnity lands for the alleged loss of or in lieu of the southeast quarter (S. E. ¼) of section numbered twenty-one (21), in township numbered forty-four (44) north of range numbered nine (9) west of the fourth principal meridian, situated in the State of

Wisconsin, by reason of the fact that the same was reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State."

Plaintiff denies that the said company ever revised its alleged indemnity selection lists as alleged in paragraph 13 of the answer or at all.

X.

Plaintiff admits that on November 2, 1882, he filed a declaratory statement, No. 11747, in the United States land office at Fargo, North Dakota, and that he alleged settlement upon the tract herein involved on the 10th day of April, 1882, substantially as alleged in the said answer.

Plaintiff demurs to all that part of the defendants' answer relating to the tender of his final proof, its rejection, and all the alleged proceedings of the Department of the Interior as embraced in pages 25, 26, 27, 28, and the first half of page 29 on the ground that same does not state facts sufficient to constitute any defense or counterclaim to or in this action.

45 In this connection plaintiff alleges that he settled upon said tract in good faith on or about the said 10th day of April, 1882, actually residing thereupon more than the required time to entitle him to make final proof and payment therefor; that he made final proof for the tract satisfactory to the Department of the Interior as to his residence, improvements, and good faith and in all other respects, and in due time payment of the Government price was made to the United States, the usual receiver's duplicate receipt issued, and on the — day of July, 1895, letters patent *to* the United States were duly issued conveying the said tract to him.

That all these facts as to the sufficiency of plaintiff's compliance with the law relating to settlement, residence, and improvements upon said tract to entitle him to a patent therefor have been found and determined by the Department of the Interior favorable to plaintiff and awarding him the land, and in the absence of fraud such facts are conclusive upon this and all other courts.

Plaintiff denies that said letters patent were wrongfully issued under a mistake of law or of fact, or that at the time plaintiff settled upon or applied to enter said land it was reserved land of the United States, not subject to settlement or entry under the provisions of the act of September 4th, 1841, and supplemental acts.

Plaintiff further denies that he abandoned the said land prior to June 21, 1884, or at any other time, but alleges that ever since tendering final proof and payment, as hereinbefore alleged, on the 4th day of April, 1883, he has been and now is the owner in fee-simple of said tract and all thereof, and was in actual, open, and notorious possession thereof from the said 10th day of April, 1882, the date of settlement thereon, to and subsequent to the said 4th day of

46 April, 1883, the date of tendering final proof and payment therefor.

And plaintiff also denies that said company ever became in equity or otherwise the owner of said land or ever was entitled to a patent therefor; but, on the contrary, the Secretary of the Interior, in the certain contest case entitled Northern Pacific Railroad Company against Fred Hewitt, involving plaintiff's right to this land, has finally found and determined the facts to be that the said land was never legally withdrawn or reserved from entry or sale; that said land was not selected or attempted to be selected by the said company until subsequent to the said settlement and entry of plaintiff; that the attempted selection by said company of said tract was never approved by the Secretary of the Interior, and that in any event the company was not entitled to said tract for indemnity purposes, nor especially in lieu of the said land in the State of Wisconsin. The said company appeared in said contest, submitted itself to the jurisdiction of the Department of the Interior, and appealed from certain decisions rendered in that department, substantially as set out in the answer.

XI.

Plaintiff denies each and every allegation in paragraph 15 of defendants' answer contained, except only that plaintiff admits the execution and delivery of the deed by the said company to defendant Emil Schultz on or about December 18th, 1889, and refusal to convey said premises to these defendants, and specifically denies that said defendant, Emil Schultz, ever believed or had reason to believe the said land was owned by said company, and further specifically denies that the improvements placed upon the said described land by defendant Emil Schultz are of the value of over fourteen hundred dollars (1,400) or of the value of any sum greater than six hundred (600) dollars; plaintiff avers in this con-
47 nection that said improvements were not made by said defendant in good faith under color of title; but defendants knew or should have known at the time of purchasing and entering upon said tract that said company had no right or title whatever thereto and had no right, either in law or equity, to sell or contract to sell the same or any part thereof.

Wherefore plaintiff prays judgment as prayed in his complaint.

Dated September 27, 1895.

T. A. CURTIS,
Plaintiff's Attorney, Lisbon, N. D.

48 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREIDERIKA SCHULTZ, Defendants.

Stipulation.

It is hereby stipulated by and between the parties hereto that the following are and shall constitute the facts and all of them, except as herein provided, in the above-entitled action, and shall constitute the evidence of the same:

1. That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company, within the territory of the United States on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

49 By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in

alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles
50 of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States and patents of lands, as aforesaid, should be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever from time to time twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided as follows: That the President of the United States should cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route thereof was fixed and as fast as might be required by the construction of said road, and that the odd-numbered sections of said land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed except by said company; that said act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific route" (13 U. S. Stat., 365), shall be considered to be in evidence herein.

51 2. That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the President of the United States.

3. That thereafter, by a joint resolution approved May 31, 1870, entitled "A resolution of Congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages and for other purposes, it was resolved and provided that in the event of there not being in any State or Territory in which said main line or branch might be located at

the time of the final location thereof the amount of lands granted by said act to said company within the limits prescribed by its charter the said company should be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency in said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of said act of July 2, 1864; that said joint resolution of May 31, 1870, shall be considered to be in evidence herein.

4. That prior to the 30th day of March, 1872, the said railroad company had duly located the general route of its road from the Red River of the North to the Missouri river, in the then
52 Territory of Dakota, now State of North Dakota, and also prior to the said 30th day of March, 1872, the said railroad company transmitted a diagram or map showing the said designated route of said road to the Commissioner of the General Land Office; that said diagram or map was duly filed in the office of the said Commissioner, and on the 30th day of March, 1872, said Commissioner of the General Land Office transmitted a prepared diagram showing the designated route of the said railroad company under act of July 2nd, 1864, to the register and receiver of the United States land office at Pembina, Dakota Territory, copy of the letter of transmittal being as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 30th*, 1872.

Register and receiver, Pembina, Dakota Ter.

GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad under act of July 2, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, pre-emption or homestead entry all the surveyed or unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on this map.

You will also increase in price to $2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability and under the pre-emption and homestead laws only, no private entry of the same being admissable until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of
53 its receipt.

Very respectfully,
(Signed) W. W. CURTIS,
Acting Commissioner.

Receipt ack'g'd April 22, 1872.
I 97526.

That on the 22nd day of April, 1872, said map or diagram was duly filed in the United States land office at Pembina, Dakota Territory, and receipt of such letter duly acknowledged by the register and receiver of said land office to the Commissioner of the General Land Office, and the said register and receiver of the Pembina land office made and designated upon the records of the said office the notations in accordance with the said map or diagram; that the tract hereinafter described and involved in this action was coterminous with said line of general route so located prior to March 30th, 1872, as aforesaid.

5. That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located that portion of the line of its road extending from the Red River of the North to the Missouri river in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 26 *May*, 1873.

SIR: I transmit herewith for appropriate action map of the definite location of the Dakota division of the Northern Pacific
54 railroad between the Red and Missouri rivers, received on the 24th instant with letter of same date from W. K. Mendenhall, Esq., att'y for the Co. in this city.

Very respectfully, your ob't servant,

C. DELANO, *Secretary*.

Hon. Willis Drummond, Comm'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office; that upon the filing of said map or plat the said Commissioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with the said line, as shown on said plat, namely, forty (40) mile and fifty (50) mile limits on each side of said line of definite location, the first named being the lands in place and hereafter, for the purpose of convenience, being designated the place lands; the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands. Thereafter the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which said line of definite location extended, and within which such place and indemnity lands fell, a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and

transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June 11th*, 1873.

Register and receiver, Pembina, D. T.

GENTLEMEN: The Northern Pacific Railroad Company
55 filed in this office on the 26th ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river in Dakota Ty. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal, ordered by my letter to you of March 30th, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits and $1.25 per acre between the forty and fifty mile or indemnity limits.

The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even-numbered sections became double minimum. Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, W. W. CURTIS,
Acting Commissioner."

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district within which said lands were situate, June 24, 1873.

The northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota, was co-
56 terminous with said line of definite location so fixed May 26, 1873, as aforesaid, and was more than forty, but within fifty miles thereof, being within the indemnity limits, and was, at the date of said grant, at the time said line was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said above letter of the acting Commissioner, dated June 11th, 1873, was written, and at the time it was received at the said United States district land office at Pembina, and at all times herein mentioned, except as otherwise hereinafter set forth, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and was and is non-mineral in character, and that said alleged order of withdrawal remained in force until revoked under the order of the Secretary of the Interior of August 15, 1887.

6. That said Northern Pacific Railroad Company, prior to 1885, duly definitely located its said line of railroad and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location, extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines equal to or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress: that such reports were duly accepted and approved by the
57 President of the United States, as provided in said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to November, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commissioners so examined it, and on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the said Secretary of the Interior transmitted said report to the President of the United States with the following recommendations: "The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same and the issuance to the company of patents for lands due on account of the completion thereof;" that said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

7. That on March 19, 1883, the said Northern Pacific Railroad Company filed in said land office at Fargo, Dakota, being the district land office of the United States for the district embracing the lands contained in said list, a certain list of selections under its said grant, embracing the said northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, claiming said tract under said act of July 2, 1864, and paid to the receiver of said office the fees required by law; that said tract was within the said Fargo United States land district, and was within the indemnity limits of the said grant to the said company. The regis-
58 ter and receiver of said land district accepted and filed said list, and attached thereto the following certificate:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April* 9, 1883.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to the said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company, by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of fifty miles on each side, and that the same are not nor is any part thereof returned and denominated as mineral land or lands not claimed as swamp lands; npr is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices, and that the said company have paid to the receivers on Mar. 19, 1883, the full sum of five thousand four hundred and eighty-seven & $\frac{20}{100}$ dollars in full payment and discharge of said fees.

"HORACE AUSTIN, *Register.*
"E. C. GEAREY, *Receiver.*"

That on May 28, 1883, the Secretary of the Interior issued
59 the following instructions of the department, to wit:

"The Commissioner of the General Land Office.

"SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemity limits of the grant to the Northern Pacific Company not actually required to supply the lands lost in place within the granted limits.

"The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant. The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States, seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant requires, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

"In order to facilitate the work of making selections I think you should instruct the local officers that when clear lists of selections free from conflict or other objection are filed with the district offi-

cers and approved by them said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

"I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Secretary.*"

That the decision of Acting Secretary Chandler, of the In-
60 terior Department, dated May 1, 1891, entitled "Sawyer *vs.* Northern Pacific R. R. Co.," as published in vol. 12 of the Decisions of the Department of the Interior Relating to Public Lands, on page 448 and following pages, shall be considered and is hereby introduced as evidence in this case.

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections on record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of loss you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist for which indemnity is allowed by law the lieu selections must be made from vacant unappropriated land
within proper sections and limits nearest the granted sections
61 in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved:

"L. Q. C. LAMAR, *Secretary.*"

That on October 12, 1887, the Northern Pacific Railroad Company filed in said United States district land office at Fargo a list designating an amount of lands equal to those selected in said list of March 19, 1883, claimed to have been lost and excepted from

said grant and within the place limits of said grant as defined on definite location and as a basis for said selections.

That the decision of Acting Secretary Chandler, of the Interior Department, dated June 10th, 1891, in the case of St. Paul, Minneapolis & Manitoba R'y Co. and St. Paul and Northern Pacific R. R. Co., published in vol 13 of the Decisions of the Department of the Interior Relating to Public Lands, on page 349 and following pages, shall be considered, and is hereby introduced in evidence in this case.

That thereafter, on February 23, 1892, the said Northern Pacific Railroad Company duly filed in said United States district land office at Fargo a rearranged list, in which it designated the lands theretofore selected, as aforesaid, in said list filed March 19, 1883, and therein set opposite each specific description of land so selected the description of a tract of equal area lost from its grant in place and in lieu of which such indemnity lands had been selected, and therein set opposite the said northeast quarter of section 13, township 132, range 57, and as a basis for the selection of the same the southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin; that said last-described tract was coterminous with and within twenty miles of the portion of said line of said Northern Pacific railroad
62 as definitely fixed, extending through the State of Wisconsin, and was at the date of the grant to the Northern Pacific Railroad Company and at the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and was at the date of said act of June 3, 1856, and at the time of the definite location of the road in aid of which said act was passed public land and free from pre-emption and other claims and rights, and that the railroad provided for by said act of June 3, 1856, was definitely located prior to the definite location of the Northern Pacific railroad in Wisconsin; that at the date of said selection by said company of said northeast quarter of section thirteen, township 132, range 57, there were no filings or entries or applications to make filing or entry for said tract other than the filing and entry of said plaintiff, as herein set forth; that said selection has never been approved by the Secretary of the Interior except as herein set forth, and neither the Department of the Interior nor the Secretary of the Interior nor any department of the Government has ever made certification that the said company was entitled to the same or to letters patent for the same, but was cancelled by said Secretary in his decision set forth in the ninth paragraph hereof; that, except as herein set forth, letters patent or any evidence of title whatsoever for said tract has never been issued or made to said company or to any person or persons whomsoever except to this plaintiff.

63 8. That under date of May 2, 1896, the Commissioner of the General Land Office made the following certificate, to wit:

"I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of lands excepted from and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are, or will be when surveyed, available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office.

(Signed) S. W. LAMOREUX,
Commissioner."

9. That the said southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin, so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57 west, lies east of Superior city, in the State of Wisconsin; that on November 14, 1895, the Secretary of the Interior rendered a decision, wherein he held that said act of Congress of July 2, 1864, and the acts supplemental thereto and amendatory thereof did not grant to said Northern Pacific Railroad Company any lands east of Superior city, in the State of Wisconsin, and that said company is not entitled under said acts or any of them to take lands east of Superior city; that said Secretary in said decision further ruled as follows:

"I further learn upon inquiry at your office that the lands east of Superior city were made the basis of the selection of a
64 large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have perhaps been sold by the company.

"The previous action of this department giving color to the company's right to a grant east of Superior city and the application of the rule that the indemnity lands should be selected nearest of those lost were the probable causes for the specification of these lands as a basis for the selection referred to.

"In view thereof I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections where the charge is that the basis was made of land east of Superior city or application to enter under the settlement laws will be received."

That within sixty days from the notice of said decision and on November 26, 1895, the said railroad company, in compliance with said order, specified as a basis for its said selection of the said north-

east quarter, section 13, township 132 — of range 57, the northeast quarter of section 1, in township 3 north of range 33, in the State of Montana, and duly filed said specification on said date in the office of the Commissioner of the General Land Office, in accordance with the said direction of the Secretary of the Interior; that said last-described tract was, at the date of said grant to said company and at the date of the definite location of its line of railroad opposite thereto, within the Crow Indian reservation; that said tract was, at the date of said grant and of said definite location, within forty miles of the line of said railroad as definitely located through said State, then Territory, of Montana; that in so
65 assigning said tract as a basis for said selection said railroad company, by its land commissioner, William H. Phipps, filed therewith in the office of said Commissioner the following statement, to wit:

"Whereas the Hon. Secretary of the Interior did on the fourteenth day of November, 1895, render a decision wherein he held that the Northern Pacific Railroad Company had no grant of lands opposite to and coterminous with its railroad between Superior and Ashland, and that therefore the designation of losses between those points as a basis for the selection of indemnity land elsewhere was invalid; and

"Whereas the Secretary of the Interior in said decision of November fourteenth, 1895, did direct that the said Northern Pacific Railroad Company be allowed sixty days from notice of said decision within which to designate other losses within its said grant in lieu of those within the points theretofore assigned; and

"Whereas the Northern Pacific Railroad Company has heretofore sold a large portion of its indemnity lands, the title to which is affected by the decision of the Secretary of the Interior of November fourteenth, 1895, hereinbefore referred to:

"Now, therefore, the said Northern Pacific Railroad Company, because of said decision of the Secretary of the Interior and to facilitate the adjustment of the title to said indemnity lands so affected by said decision, reserving and saving all rights of the company heretofore acquired and expressly maintaining and insisting that all provisions of the act of July 2, 1864, for its benefit are in all respects in full force and operation as far east as Ashland, the Northern Pacific Railroad Company, for the sole purpose of protecting and saving the titles of its purchasers to indemnity
66 lands affected by the decision of the Secretary of the Interior of November fourteenth, 1895, hereby submits, pursuant to the directions of said decision, a list of losses to be substituted for those heretofore embraced in Fargo list No. 6 as originally filed on March 19, 1883, and rearranged February 23rd, 1892.

"And the said company prays the approval of said amended list and the prompt issuance of patent therefor.

"WM. H. PHIPPS,
"*Land Commissioner N. P. R. R. Co.*"

That said tract so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 no. of range 57, was accepted from said grant to said company by reason of being included in said Indian reservation, and said company was entitled to select indemnity therefor.

9. That on or about the tenth day of April, 1882, plaintiff, being qualified to hold and acquire land under the pre-emption laws of the United States, settled upon and improved the said northeast quarter of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the 5th principal meridian, in the county of Sargent, State of North Dakota, then the Territory of Dakota, with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States by the citizens thereof and those who have declared their intention to become such citizens, and that on the 2nd day of November, 1882, he duly presented to the United States land office at Fargo, Dakota Territory (now State of North Dakota), a declaratory statement, No. 11747, for said tract, as provided by law, which was duly received, filed, and placed upon the records of the
67 said land office.

10. That plaintiff resided upon and cultivated said land, as required by law, from the said 10th day of April, 1882, to the 4th day of April, 1883, at which latter date he submitted final proof therefor, as provided by law, and then and there dul*t* tendered the Government price for said tract, together with all required fees, to the said land office, and that said final proof was then and there rejected by the register and receiver of the United States district land office, they assigning as a reason therefor that the described land had been withdrawn from entry under the said act of July 2, 1864, and the acts of Congress supplemental thereto and amendatory thereof; that plaintiff duly appealed from the said decision of the district land office to the Commissioner of the General Land Office, who, on the 5th day of October, 1883, affirmed the decision of the district land office; that the plaintiff had no notice whatsoever of the said decision of October, 1883, until on or about the 1st day of August, 1888, at which date he made application for a review thereof by the Commissioner of the General Land Office, and thereupon that officer, on the 25th day of September, 1888, rendered the following decision, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Sept.* 25, 1888.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of October 5, 1883, affirming your action in rejecting his final proof for N. E. ¼ section 13, towns. 132 N., range 57 W.

"Said tract is within the 50-mile indemnity limit of the
68 withdrawal for the benefit of the Northern Pacific R. R. Co. ordered by letter from this office, dated June 11, 1873, received at the local land office then at Pembina June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th day of October following. The whole of said section was selected by the agent of the railroad company March 19, 1883, as per list No. 6.

"The records here show that Hewitt presented his final pre-emption proof at your office, which was rejected for conflict with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883.

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over twenty-one years of age, and a qualified pre-emptor July 10th, 1882; his improvements consisted of a frame house 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior in the case of The Northern Pacific R. R. Co. *vs.* Guilford Miller it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the 6th section of the granting act, and, being in violation of the law and without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the
69 general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision and that 60 days will be allowed for appeal.

"The resident attorneys for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"*Commissioner.*"

That the said case of Northern Pacific Railroad Company *vs.* Guilford Miller and the report thereof shall be considered to be in evidence herein and may be considered by the court.

That thereafter the said Northern Pacific Railroad Company duly

appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior on August 11, 1894, made and rendered his certain decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

"The Commissioner of the General Land Office.

"SIR: I have considered the appeal of the Northern Pacific
70 R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼ sec. 13, T. 132 N., R. 57 west, Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing, upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D., —), and your office decision is therefore affirmed, and the company's selection will be cancelled. Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That the said case of N. P. R. R. Co. *vs.* Davis (Davis *vs.* N. P. R. R. Co.) and the report thereof shall be considered to be in evidence herein and may be considered by the court.

That on June 22, 1895, pursuant to said decision of the Secretary of August 11, 1894, and based upon said pre-emption final proof so made, as aforesaid, by said plaintiff, letters patent of the United States were duly issued under the great seal of the United States, purporting to convey to said plaintiff the said northeast quarter of section 13, township 132 of range 57, North Dakota.

11. That from the said 10th day of April, 1882, to the 21st day of June, 1884, plaintiff resided upon and was in the actual possession of said tract and every portion thereof and had valuable improvements thereon.

12. That on June 21, 1884, and while plaintiff was so in possession of said land the said defendant, Emil Schultz, made and entered into a certain contract in writing with the said rail-
71 road company, by the terms whereof said railroad company agreed, in consideration of twelve hundred dollars ($1,200), to sell and convey the said northeast quarter of section 13, township 132, range 57, to the said defendant, Emil Schultz, and the said Emil Schultz then and therein agreed to purchase the said land from the said company and to pay to said company the said sum therefor; that upon the making of said contract the said Emil Schultz entered upon said tract and ousted said plaintiff from the

actual possession thereof and took up his residence thereon, and has since continued to reside thereon and cultivate and improve the same; that the said defendant, Schultz, having paid to the said railroad company the consideration agreed by him to be paid to said company for said land on said contract of sale, as aforesaid, the said company, on or about December 18, 1889, made, executed, and delivered its certain indenture of deed, with full covenants of warranty, whereby it conveyed to the said defendant, Schultz, the said northeast quarter of section 13, in township 132 north of range 57 west.

13. The plaintiff has not at any time made a conveyance or attempted conveyance of said premises, but now holds any and all title thereto which he may have received from the United States, as hereinbefore set forth.

The said defendant, Schultz, has not at any time made a conveyance or attempted conveyance of the said premises, but now holds any and all title thereto which he may have received from the said Northern Pacific Railroad Company by virtue of the said contract and deed.

14. That the value of the rents, issues, and profits of said tract during the time of its occupancy by said Schultz, as aforesaid, is the sum of seven hundred and fifty (750) dollars.

15. That the value of the improvements made upon said
72 tract by said defendant, Schultz, is the sum of six hundred (600) dollars, and the value of the land without the improvements is the sum of eight hundred (800) dollars.

16. That the said defendant Friederika Schultz is the wife of the said defendant Emil Schultz.

17. That none of the buildings or improvements made or placed upon the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred thirty-two (132) north of range fifty-seven (57) west by the defendants or either of them, were made or placed thereupon while the defendants or either of them were holding under color of title adversely to the claim of plaintiff in good faith.

18. That if the plaintiff in this section shall prevail the defendants and each of them hereby waive all claim or right of recovery against plaintiff by counter-claim or otherwise for the value of said buildings and improvements or either or any of them, and consent and agree that proper findings in accordance with this stipulation may be made and judgment and decree based thereon may be entered accordingly in this action.

19. That the tract of land involved in the action entitled Grandin *vs.* Le Bar, as reported in 57 N. W. Rep., 241 and the pages following, was selected by the said Northern Pacific Railroad Company at the same time and included in the same list of selections as the tract involved in this action, and the foregoing certificate, dated April 9th, 1883, on pages 8 and 9, is appended to the said list of selections, included in which list is the tract involved in the case of Grandin *vs.* Le Bar aforesaid.

20. That either party to this action may submit other or
73 further evidence in this action.

THOMAS A. CURTIS,
PIERCE & AUSTIN,
Attorneys for Plaintiff.
BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

74 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Findings of Fact and Conclusions of Law.

The above-entitled action having been regularly brought on to be heard by the court, a jury having been by stipulation of the parties to the said action duly waived, and the parties hereto, by their respective attorneys, having stipulated all the facts bearing upon the issues herein, and the defendants to this action having duly stipulated and agreed in writing that if the plaintiff should prevail the defendants and each of them waive all claim or right of recovery against plaintiff by counter-claim or otherwise for the value of said buildings and improvements or either or any of them, and the said cause having been argued by Pierce & Austin on behalf of the plaintiff, and by James B. Kerr and J. B. McNamee on behalf of defendants, and the court after hearing and considering the evidence introduced and the arguments of counsel and the cause having been submitted to the court for its decision, the court now finds the following facts:

Findings of Fact.

I.

That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the north-
75 ern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most

eligible railroad route as should be determined by said company, within the territory of the United States, on a north line of the 45th degree of latitude to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State or Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold,
reserved, occupied by homestead settlers, or pre-empted or
76 otherwise disposed of, other lands shall be selected by the
company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

Provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and — lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: And further provided, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States and patents of land, as aforesaid, should be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to

said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided as follows:

"That the President of the United States shall cause the
77 lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a less price than two dollars and fifty cents per acre when offered for sale."

II.

That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof, in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served with such acceptance on the President of the United States.

III.

That thereafter, by a joint resolution approved May 31, 1870, entitled "A resolution of Congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages and for other purposes," it was resolved and provided that in the event of there not being in any State or Territory in which said main line or branch might be located at the time of the final location thereof the amount of
78 lands granted by said company within the limits prescribed by its charter the said company should be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency in said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that would have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, subsequent to the passage of said act of July 2, 1864.

IV.

That prior to the 30th day of March, 1872, the said railroad company had duly located the general route of its road from the Red River of the North to the Missouri river, in the then Territory of Dakota, now State of North Dakota, and also prior to the said 30th day of March, 1872, the said railroad company transmitted a diagram or map showing the said designated route of said road to the Commissioner of the General Land Office; that said diagram or map was duly filed in the office of the said Commissioner, and on the 30th day of March, 1872, said Commissioner of the General Land Office transmitted a prepared diagram showing the designated route of the said railroad company under act of July 2nd, 1864, to the register and receiver of the United States land office at Pembina, Dakota Territory, copy of the letter of transmittal being as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *March 30th*, 1872.

"Register and receiver, Pembina, Dakota Ter.

"GENTLEMEN: I transmit herewith a diagram showing the
79 designated route of the Northern Pacific railroad under act of July 2, 1864, and, by direction of the Secretary of the Interior, you are directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

"You will also increase in price to $2.50 per acre the even-numbered sections within those limits and dispose of them at that ratability and under the pre-emption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

"This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of its receipt.

"Very respectfully,
"(Signed) W. W. CURTIS,
"*Acting Commissioner.*"

Receipt ack'g'd April 22, 1872. 1, 97526.

That on the 22nd day of April, 1872, said map or diagram was duly filed in the United States land office at Pembina, Dakota Territory, and receipt of such letter duly acknowledged by the register and receiver of said land office to the Commissioner of the General Land Office, and the said register and receiver of the Pembina land office made and designated upon the records of the said office the notations in accordance with the said map or diagram; that the tract hereinafter described and involved in this action was coterminous with said line of general route so located prior to March 30th, 1872, as aforesaid.

V.

That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located
80 that portion of the line of its road extending from the Red River of the North to Missouri river, in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26th, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 26, 1873.

"SIR: I transmit herewith for appropriate action map of definite location of the Dakota division of the Northern Pacific railroad between the Red and the Missouri rivers, received on the 24th instant, with letter of the same date from W. K. Mendenhall, Esq., att'y for the company, in this city.

"Very respectfully, your ob't servant,

"C. DELANO, *Secretary.*

"Hon. Willis Drummond, Comm'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office; that upon the filing of said map or plat the said Commissioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with the said line, as shown on said plat, namely, forty (40) miles and fifty (50) mile limits on each side of said line of definite location, the first named being the lands in place, and hereafter, for the purpose of convenience, being designated the place lands; the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands; thereafter the Commissioner of the
81 General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which said line of definite location extended, and within which such place and indemnity lands fell, a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 11th*, 1873.

"Register and receiver, Pembina, D. T.

"GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26th ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river in Dakota Territory. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30th, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits, and $1.25 per acre between the forty and fifty mile or indemnity limits.

"The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

82 "The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even-numbered sections became double minimum.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, W. W. CURTIS,
"*Acting Commissioner.*"

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district within which said lands were situate, June 24, 1873.

The northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota, was coterminous with said line of definite location so fixed May 26, 1873, as aforesaid, and was more than forty, but within fifty, miles thereof, being within the indemnity limits, and was, at the date of said grant, at the time said line was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said above letter of the acting Commissioner, dated June 11th, 1873, was written, and at the time it was received at the said United States district land office at Pembina, and at all times herein mentioned, except as otherwise hereinafter set forth, public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and was and is non-mineral in character, and that said alleged order of withdrawal remained in force until revoked under the order of the Secretary of the Interior of August 15, 1887.

VI.

That said Northern Pacific Railroad Company prior to 1885
83 duly definitely located its said line of railroad and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line that as fast as portions of said railroad and telegraph lines equal to or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided by said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to November, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commissioners so examined it and, on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the Secretary of the Interior transmitted said report to the President of the United States with the following recommendations: "The commissioners in their report represent that this portion of the
84 road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same and the issuance to the company of patents for lands due on account of the completion thereof;" that said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

VII.

That on March 19, 1883, the said Northern Pacific Railroad Company filed in said land office at Fargo, Dakota, being the district land office of the United States for the district embracing the lands contained in said list, a certain list of selections under its said grant embracing the said northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, claiming said tract under said act of July 2, 1864, and paid to the receiver of said office the fees required by law; that said tract was within the said Fargo United States land district and was within the indemnity limits of the said grant to the said company. The register and re-

ceiver of said land district accepted and filed said list and attached thereto the following certificate:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April* 9, 1883.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to the said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company, by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of fifty miles on each side, and that the same
85 are not nor is any part thereof returned and denominated as mineral lands or lands not claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices, and that the said company have paid to the receivers, on March 19, 1883, the full sum of five thousand four hundred and eighty-seven and $\frac{29}{100}$ dollars in full payment and discharge of said fees.

"HORACE AUSTIN, *Register.*
"E. C. GEAREY, *Receiver.*"

That on May 28, 1883, the Secretary of the Interior issued the following instructions of the department, to wit:

"The Commissioner of the General Land Office.

"SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in the place within the granted limits.

"The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant. The unparalleled demand for the lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States, seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant requires for the best interests of the country and for all parties concerned that the withdrawals should not be maintained any longer than is actually
86 necessary for the adjustment of the guaranteed rights of the company.

"In order to facilitate the work of making selections, I think you should instruct the local officers that when clear lists of selections free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place *of* your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company, as heretofore.

"I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Secretary.*"

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections on record until directed to do so.

"Where indemnity selections have heretofore been made without specifications of loss you will require the companies to designate the deficiencies for which such indemnity is to be applied
87 before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist for which indemnity is allowed by law the lieu selections must be made from vacant unappropriated land within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved.

"L. Q. C. LAMAR, *Secretary.*"

That on October 12, 1887, the Northern Pacific Railroad Company filed in said United States district land office at Fargo a list designating an amount of lands equal to those selected in said list of March 19, 1883, claimed to have been lost and excepted from said grant and within the place limits of said grant as defined on definite location and as a basis for said selections.

That thereafter, on February 23, 1892, the said Northern Pacific

Railroad Company duly filed in said United States district land office at Fargo a rearranged list, in which it designated the lands theretofore selected, as aforesaid, in said list filed March 19, 1883, and therein set opposite each specific description of land so selected the description of a tract of equal area lost from its grant in place and in lieu of which such indemnity lands had been selected and therein set opposite the said northeast quarter of section 13, township 132, range 57, and as a basis for the selection of the same the southeast quarter of section 21, township 44 north of range 9 west of the fourth principal meridian, Wisconsin; that said last-described
88 tract was coterminous with and within twenty miles of the portion of said line of said Northern Pacific railroad as definitely fixed extending through the State of Wisconsin, and was at the date of the grants to the Northern Pacific Railroad Company and at the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of an act of Congress approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and was at the date of said act of June 3, 1856, and at the time of the definite location of the road in aid of which said act was passed public land and free from pre-emption and other claims and rights, and that the railroad provided for by the said act of June 3, 1856, was definitely located prior to the definite location of the Northern Pacific railroad in Wisconsin; that at the date of said selection by said company of said northeast quarter of section 13, township 132, range 57, there were no filings or entries or applications to make filings or entry for said tract other than the filing and entry of said plaintiff as herein set forth, and that said selection has never been approved by the Secretary of the Interior except as herein set forth, and neither the Department of the Interior nor the Secretary of the Interior nor any department of the Government has ever made certification that the said company was entitled to the same or to letters patent for the same, but was cancelled by said Secretary in his decision set out in the eleventh finding hereof; that, except as herein set forth, letters patent or any evidence of title whatsoever for said tract has never been issued or made to said company
89 or to any person or persons whomsoever except to this plaintiff.

VIII.

That under date of May 2, 1896, the Commissioner of the General Land Office made the following certificate, to wit:

"I, S. W. Lamoreaux, Commissioner of the General Land Office, do hereby certify that I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of land excepted from and lost to said grant within its primary

limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are or will be when surveyed available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office.

"(Signed) S. W. LAMOREAUX,
"*Commissioner.*"

IX.

That the said southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin, so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57 west, lies east of Superior city, in the State of Wisconsin; that on November 14, 1895, the Secretary of the Interior rendered a decision, wherein he held that said act of Congress of July 2, 1864, and the acts supplemental thereto and amendatory thereof did not grant to said Northern Pacific Railroad Company any lands east of Superior city, in the State of Wisconsin, and that said company is not entitled under said acts or any of them to take lands east of Superior city;
90 that said Secretary in said decision further ruled as follows:

"I further learn upon inquiry at your office that the lands east of Superior city were made the basis of the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have perhaps been sold by the company.

"The previous action of this department giving color to the company's right to a grant east of Superior city and the application of the rule that the indemnity lands should be selected nearest of those lost were the probable causes for the specification of these lands as a basis for the selections referred to.

"In view thereof I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections where the charge is that the basis was made of lands east of Superior city or application to enter under the settlement laws will be received."

That within sixty days from the notice of said decision and on November 26, 1895, the said railroad company, in compliance with said order, specified as a basis for its said selection *of* the said northeast quarter, section 13, township 132 of range 57: the northeast quarter of section 1, in township 3 north of range 33, in the State of Montana, and duly filed said specification on said date in the office of the Commissioner of the General Land Office, in accordance with the said direction of the Secretary of the Interior; that said last-described tract was at the date of said grant to said company and at the date of the definite location of its line of railroad oppo-

site thereto within the Crow Indian reservation; that said
91 tract was at the date of said grant and of said definite location within forty miles of the line of said railroad as definitely located through said State, then Territory, of Montana; that in so assigning said tract as a basis for said selection, said railroad company, by its land commissioner, William H. Phipps, filed therewith, in the office of said commissioner, the following statement, to wit:

"Whereas the honorable Secretary of the Interior did, on the fourteenth day of November, 1895, render a decision wherein he held that the Northern Pacific Railroad Company had no grant of lands opposite to and coterminous with its railroad between Superior and Ashland, and that therefore the designation of losses between those points as a basis for the selection of indemnity land elsewhere was invalid; and

"Whereas the Secretary of the Interior, in said decision of November 14, 1895, did direct that the said Northern Pacific Railroad Company be allowed sixty days from notice of said decision within which to designate other losses within its grant in lieu of those within the points theretofore assigned; and

"Whereas the Northern Pacific Railroad Company has heretofore sold a large portion of its indemnity lands, the title to which is affected by the decision of the Secretary of the Interior of November 14, 1895, hereinbefore referred to:

"Now, therefore, the said Northern Pacific Railroad Company, because of said decision of the Secretary of the Interior, and to facilitate the adjustment of the title to said indemnity lands so affected by said decision, reserving and saving all rights of the company heretofore acquired and expressly maintaining and insisting that all provisions of the act of July 2, 1864, for its benefit are
in all respects in full force and operation as far east as Ash-
92 land, the Northern Pacific Railroad Company, for the sole purpose of protecting and saving the titles of its purchasers to indemnity lands affected by the decision of the Secretary of the Interior of November 14, 1895, hereby submits, pursuant to the directions of said decision, a list of losses to be substituted for those hereinbefore embraced in Fargo list No. 6 as originally filed on March 19, 1883, and rearranged February 23, 1892.

"And the said company prays the approval of said amended list and the prompt issuance of patent therefor.

"WM. H. PHIPPS,
"*Land Commissioner, N. P. R. R. Co.*"

That said tract so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57, was excepted from said grant to said company by reason of being included in said Indian reservation, and said company was entitled to select indemnity therefor.

X.

That on or about the 10th day of April, 1882, plaintiff, being qualified to hold and acquire land under the pre-emption laws of the United States, settled upon and improved the said northeast quarter of section 13, in township 132 north of range 57 west of the fifth principal meridian, in the county of Sargent, State of North Dakota, then the Territory of Dakota, with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States by the citizens thereof and those who have declared their intention to become such citizens, and that on the 2nd day of November, 1882, he duly presented to the United States land office at Fargo, Dakota Territory (now State of North Dakota), a declaratory statement, No. 11747, for said tract, as provided by law,
93 which was duly received, filed, and placed upon the records of the said land office.

XI.

That plaintiff resided upon and cultivated said land, as required by law, from the said 10th day of April, 1882, to the 4th day of April, 1883, at which latter date he submitted final proof therefor as provided by law, and then and there duly tendered the Government price for said tract, together with all the required fees, to the said land office, and that said final proof was then and there rejected by the register and receiver of the United States district land office, they assigning as a reason therefor that the described land had been withdrawn from entry under the said act of July 2, 1864, and the acts of Congress supplemental thereto and amendatory thereof; that plaintiff duly appealed from the said decision of the district land office to the Commissioner of the General Land Office, who, on the 5th day of October, 1883, affirmed the decision of the district land office; that the plaintiff had no notice whatsoever of the said decision of October, 1883, until on or about the 1st day of August, 1888, at which date he made application for a review thereof by the Commissioner of the General Land Office, and thereupon that officer, on the 25th day of September, 1888, rendered the following decision, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Sept.* 25, '88.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of October 5, 1883, affirming your action in rejecting his final proof for N. E. ¼, section 13, township 134 N., range 57 W.

94 "Said tract is within the 50-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific R. R. Co., ordered by letter from this office, dated June 11, 1873, received at

the local office then at Pembina, June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th day of October following; the whole of said section was selected by the agent of the railroad company March 19, 1883, per list No. 6.

"The records here show that Hewitt presented his final pre emption proof at your office, which was rejected for conflict with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883.

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over 21 years of age, and a qualified pre-emptor, July 10th, 1882; his improvements consisted of a frame house, 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior in the case of The Northern Pacific Railroad Company *vs.* Guilford Miller, it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the sixth section of the granting act, and, being in violation of the law and without
95 effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision and that 60 days will be allowed for appeal.

"The resident attorneys for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"Commissioner."

That thereafter the said Northern Pacific Railroad Company duly appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior on August 11, 1894, made and rendered his certain decision in the following words and figures, to wit:

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"The Commissioner of the General Land Office.

"SIR: I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼, sec. 13, T. 132 N., R. 57 W., Fargo, North Dakota, on account of the prior claim
96 of Fred Hewitt under his pre-emption filing upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D.), and your office decision is therefore affirmed and the company's selection will be cancelled.

"Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That on June 22, 1895, pursuant to said decision of the Secretary of August 11, 1894, and based upon said pre-emption final proof so made, as aforesaid, by said plaintiff, letters patent of the United States were duly issued under the great seal of the United States purporting to convey to said plaintiff the said northeast quarter of section 13, township 132 of range 57, North Dakota.

XII.

That from the said 10th day of April, 1882, to the 21st day of June, 1884, plaintiff resided upon and was in actual possession of said tract and every portion thereof and had valuable improvements thereon.

XIII.

That on June 21st, 1884, and while plaintiff was so in possession of said land, the said defendant, Emil Schultz, made and entered into a certain contract in writing with the said railroad company, by the terms whereof said railroad company agreed, in consideration of twelve hundred dollars ($1,200), to sell and convey the said northeast quarter of section 13, township 132, range 57, to the
97 said defendant, Emil Schultz, and the said Emil Schultz then and therein agreed to pay to the said company the said sum therefor; that upon the making of said contract the said Emil Schultz entered upon said tract and ousted said plaintiff from the actual possession thereof and took up his residence thereon, and has since continued to reside thereon and cultivate and improve the same; that the said defendant, Schultz, having paid to the said railroad company the consideration agreed by him to be paid to said company for said land in said contract of sale, as aforesaid,

the said company on or about December 18, 1889, made, executed, and delivered its certain indenture of deed with full covenants of warranty, whereby it conveyed to the said defendant, Schultz, the said northeast quarter of section 13, in township 132 north of range 57 west.

XIV.

That the plaintiff has not at any time made a conveyance or attempted conveyance of said premises, but now holds title thereto, which he received from the United States as hereinbefore set forth. The said defendant, Schultz, has not at any time made a conveyance of the said premises.

XV.

That the value of the rents, issues, and profits of said tract during the time of its occupancy by said Schultz, as aforesaid, is the sum of seven hundred and fifty (750) dollars.

XVI.

That the value of the improvements made upon said tract by said defendant, Schultz, is the sum of six hundred (600) dollars, and the value of the land without the improvements is the sum of eight hundred (809) dollars.

XVII.

That the said defendant, Friederika Schultz, is the wife of
98 the said defendant, Emil Schultz.

XVIII.

That none of the buildings or improvements made or placed upon the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred thirty-two (132) north of range fifty-seven (57) west, by the defendants or either of them were made or placed thereon while the defendants or either of them were holding under color of title, adversely to the claim of plaintiff, in good faith.

XIX.

That the tract of land involved in the action entitled Grandin *vs.* Le Bar, as reported in 57 N. W. Rep., 241, and the pages following, was selected by the said Northern Pacific Railroad Company at the same time and included in the same list of selections as the tract involved in this action, and the foregoing certificate, dated April 9th, 1883, is appended to the said list of selections, included in which list is the tract involved in the case of Grandin *vs.* La Bar aforesaid.

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

Conclusions of Law.

I.

That plaintiff is the owner in fee-simple of the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred thirty-two (132) north of range numbered fifty-seven (57) west of the fifth principal meridian.

II.

That defendants or either of them or any persons claiming or to claim said premises or any part thereof under them or either of them have no estate or interest in or right or title to or lien upon said premises or any part thereof.

99

III.

That the order of withdrawal made by the acting Commissioner of the General Land Office on June 11th, 1873, was made in violation of law and without effect and void in so far as it relates to the tract of land in controversy.

IV.

That the Northern Pacific Railroad Company has never made a valid selection of the tract involved herein for indemnity purposes.

V.

That defendants wrongfully and unlawfully withhold the possession of said premises from plaintiff, and that plaintiff is entitled to possession of said premises and every part thereof.

VI.

That plaintiff is entitled to judgment against defendants for the sum of seven hundred fifty ($750) dollars, the said value of the rents, issues, and profits of said premises.

VII.

That plaintiff is entitled to judgment against defendants for his costs and disbursements in this action, to be taxed and allowed by the clerk of this court.

Let judgment be entered accordingly.

By the court:

W. S. LAUDER, *Judge.*

Dated October 4th, 1897.

To the foregoing conclusions of law and to each thereof and to the whole thereof the defendant, by his counsel, duly excepts; which

exceptions are hereby allowed and the same are ordered brought upon and made part of the record herein.

By the court:

W. S. LAUDER, *Judge.*

October 4th, 1897.

100 It is ordered that all further proceedings herein are hereby stayed for sixty days, to enable defendant to take such further proceedings as he may be advised by his counsel.

By the court:

W. S. LAUDER, *Judge.*

October 4th, 1897.

101 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff, }
vs. }
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendant-. }

Now comes the defendants, by their attorneys, Ball, Watson & Maclay, James B. Kerr and J. B. McNamee, and except to all the findings of fact and conclusions of law herein for the reason and upon the ground that said findings of fact and conclusions of law were prepared by the attorney for the plaintiff and signed by the court without notice to the attorneys for said defendants and without a submission to said defendants of a copy thereof or a copy of the proposed findings of fact prior to the signing thereof.

Defendants further except to the first conclusion of law on the ground that the same is not sustained by the evidence and the findings of fact therein.

Defendants except to the second conclusion of law on the ground that the same is not sustained by the evidence and the findings of fact therein.

Defendants in like manner except to the third conclusion of law upon the ground and for the reason that the same is not sustained by the evidence or the findings therein and is contrary to the findings and contrary to the evidence.

Defendants in like manner except to the fourth conclusion of law upon the ground that the same is not sustained by the evidence of findings herein, and that the same is contrary to the law and contrary to the evidence and contrary to the findings herein.

102 Defendants in like manner except to the fifth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to the law, contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the sixth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the seventh conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

103 STATE OF NORTH DAKOTA, *County of Sargent,* } *ss:*

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Judgment and Decree.

The above-entitled action having been regularly brought to be tried and heard by the court, a jury having been by stipulation of all the parties to the said action duly waived, and after hearing the argument of counsel and duly considering all the evidence submitted, and the said cause having been duly submitted to the court for determination, and the court having duly made and filed its findings of fact and conclusions of law, and the decision herein in writing having been duly rendered and filed by the court, wherein and whereby judgment was ordered for the said plaintiff and against the said defendants for the relief prayed for in the plaintiff's complaint, together with the costs and disbursements of this action:

Now, therefore, on motion of Pierce & Austin, attorneys for plaintiff, it is hereby adjudged, determined, and decreed:

I.

That plaintiff is the owner in fee-simple of the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, situated in the county of Sargent and State of North Dakota.

II.

That defendants or either of them or any persons claiming
104 or to claim said premises or any part thereof under them or either of them have no estate or interest in or right or title to or lien upon said premises or any thereof.

III.

That defendants wrongfully or unlawfully withhold the possession of said premises from plaintiff, and that plaintiff is entitled to possession of said premises and every part thereof, and that plain-

tiff have and recover possession of said premises and every part thereof.

IV.

That plaintiff have and recover of and from the defendants, Emil Schultz and Friederika Schultz, the sum of seven hundred fifty (750) dollars, the value of the rents, issues, and profits of the said premises, together with the costs and disbursements of this action, taxed and allowed at thirty-three (33) and $\frac{40}{100}$ dollars, making a total sum of seven hundred eighty-three (783) and $\frac{40}{100}$ dollars.

Witness the Hon. W. S. Lauder, judge of the district court within and for said county and State, and the seal of the court, at Forman, North Dakota, this 31st day of January, 1898.

O. B. JOHNSON,
[SEAL.] *Clerk of District Court, Sargent County, North Dakota.*

105 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following statement of the case may be signed and settled by the Honorable W. S. Lauder without notice to either party.

THOMAS A. CURTIS,
PIERCE & AUSTIN,
Attorneys for Plaintiff.
BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

2, 3, '98, signed.

106 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Statement of Case.

Be it remembered that the above-entitled action having come on for trial before this court, the Honorable W. S. Lauder, district judge, presiding without a jury, the parties having stipulated in writing

that a jury be waived, the plaintiff appearing by T. A. Curtis and Pierce & Austin, his attorneys, and the defendants appearing by Ball, Watson & Maclay, James B. Kerr, and J. B. McNamee, their attorneys, and the said parties, by their attorneys, having stated that they were ready to try the issues made by the pleadings in the said action, did then and there present and file a stipulation in writing setting forth all the facts and evidence touching the issues made by their said pleadings, and did then and there, in open court, agree and consent to submit the said issues to the said court for determination upon the said stipulation and upon all the files in said action, the said stipulation being as follows, to wit:

STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

107 *Stipulation.*

It is hereby stipulated by and between the parties hereto that the following are and shall constitute the facts and all of them, except as herein provided, in the above-entitled action, and shall constitute the evidence of the same:

1. That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alter-

nate sections per mile, on each side of said railroad line, as
108 said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners
should so report to the President of the United States, and
109 patents of lands, as aforesaid, should be issued to said company confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided that the President of the United States should cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route thereof was fixed and as fast as might be required by the construction of said road, and that the odd-numbered sections of said land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed except by said company; that said act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph

line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route" (13 U. S. Stat., 365), shall be considered to be in evidence herein.

2. That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the President of the United States.

3. That thereafter, by a joint resolution approved May 31, 1870, entitled "A resolution of Congress authorizing the Northern
110 Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages, and for other purposes," it was resolved and provided that in the event of there not being in any State or Territory in which said main line or branch might be located at the time of the final location thereof the amount of lands granted by said act to said company within the limits prescribed by its charter the said company should be entitled, under the directions of the Secretary of the Interior, to receive as many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency in said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of said act of July 2, 1864; that said joint resolution of May 31, 1870, shall be considered to be in evidence herein.

4. That prior to the 30th day of March, 1872, the said railroad company had duly located the general route of its road from the Red River of the North to the Missouri river, in the then Territory of Dakota, now State of North Dakota, and also prior to the said 30th day of March, 1872, the said railroad company transmitted a diagram or map showing the said designated route of said road to the Commissioner of the General Land Office; that said diagram or map was duly filed in the office of the said Commissioner, and on the 30th day of March, 1872, said Commissioner of the General Land Office transmitted a prepared diagram showing the designated route of the said railroad company under act of July 2nd, 1864, to the register and receiver of the United States land office at Pem-
111 bina, Dakota Territory, copy of the letter of transmittal being as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *March 30th*, 1872.

"Register and receiver, Pembina, Dakota Ter.

"GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad under act of July 2, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, pre emption, or homestead

entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

"You will also increase in price to $2.50 per acre the even-numbered sections within those limits and dispose of them at that ratability and under the pre-emption and homestead laws only, no private entry of the same being admissable until these lands have been offered at the increased price.

"This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

"Very respectfully,

"(Signed) W. W. CURTIS,
"*Acting Commissioner.*"

Receipt ack'g'd April 22, 1872.
I 97526.

That on the 22nd day of April, 1872, said map or diagram was duly filed in the United States land office at Pembina, Dakota Territory, and receipt of such letter duly acknowledged by the register and receiver of said land office to the Commissioner of the General Land Office, and the said register and receiver of the Pembina
112 land office made and designated upon the records of the said office the notations in accordance with the said map or diagram; that the tract hereinafter described and involved in this action was coterminous with said line of general route so located prior to March 30th, 1872, as aforesaid.

5. That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located that portion of the line of its road extending from the Red River of the North to the Missouri river, in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., 26 *May*, 1873.

"SIR: I transmit herewith for appropriate action map of the definite location of the Dakota division of the Northern Pacific railroad between the Red and Missouri rivers, received on the 24th instant, with letter of same date from W. K. Mendenhall, Esq., att'y for the Co. in this city.

"Very respectfully, your ob't servant,

"C. DELANO, *Secretary.*

"Hon. Willis Drummond, Comm'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office;

that upon the filing of said map or plat the said Commis-
113 sioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with the said line as shown on said plat, namely, forty (40) mile and fifty (50) mile limits on each side of said line of definite location, the first named being the lands in place and hereafter, for the purpose of convenience, being designated the place lands, the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands. Thereafter the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which said line of definite location extended and within which such place and indemnity lands fell a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 11th*, 1873.

"Register and receiver, Pembina, D. T.

"GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26th ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river, in Dakota Ty. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the
forty mile limits of withdrawal ordered by my letter to you
114 of March 30th, 1872, upon a designated line and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits and $1.25 per acre between the forty and fifty mile of indemnity limits.

"The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

"The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even-numbered sections became double minimum. Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, W. W. CURTIS,
"*Acting Commissioner.*"

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district within which said lands were situate, June 24, 1873.

The northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota, was coterminous with said line of definite location so fixed May 26, 1873, as aforesaid, and was more than forty, but within fifty, miles thereof, being within the indemnity limits, and was, at the date of said grant, at the time said line was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said above letter of the acting Commissioner, dated June 11th, 1873, was written, and at the time it was received at the
115 said United States district land Office at Pembina, and at all times herein mentioned, except as otherwise hereinafter set forth, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, and was and is non-mineral in character, and that said alleged order of withdrawal remained in force until revoked under the order of the Secretary of the Interior of August 15, 1887.

6. That said Northern Pacific Railroad Company, prior to 1885, duly definitely located its said line of railroad and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines equal to or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to November, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commis-
116 sioners so examined it, and on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the said Secretary of the Interior transmitted said report to the President of the United States with the following recommendation: "The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same

and the issuance to the company of patents for lands due on account of the completion thereof." That said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

7. That on March 19, 1883, the said Northern Pacific Railroad Company filed in said land office at Fargo, Dakota, being the district land office of the United States for the district embracing the lands contained in said list, a certain list of selections under its said grant embracing the said northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, claiming said tract under said act of July 2, 1864, and paid to the receiver of said office the fees required by law; that said tract was within the said Fargo United States land district and was within the indemnity limits of the said grant to the said company. The register and receiver of said land district accepted and filed said list and attached thereto the following certificate:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April* 9, 1883.

"We hereby certify that we have carefully and critically
117 examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to the said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of forty miles on each side, and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands not claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land officers, and that the said company have paid to the receivers on Mar. 19, 1883, the full sum of five thousand four hundred and eighty-seven & $\frac{20}{100}$ dollars in full payment and discharge of said fees.

"HORACE AUSTIN, *Register.*
"E. C. GEAREY, *Receiver.*"

That on May 28, 1883, the Secretary of the Interior issued the following instructions of the department, to wit:

"The Commissioner of the General Land Office:

"SIR: It is my desire to open for settlement as speedily as possible
118 all the lands within the indemnity limits of the grant to the Northern Pacific Company not actually required to supply the lands lost in place within the granted limits.

"The grant should be adjusted at the earliest possible time that the orders of withdrawal may be vacated without unreasonable delay as indicated in my letter of the 17th instant. The unparelled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant, required, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

"In order to facilitate the work of making selections I think you should instruct the local officers that when clear lists of selections free from conflict or other objections are filed with the district officers and approved by them said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

"I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Secretary*."

That the decision of acting Secretary Chandler, of the Interior Department, dated May 1, 1891, entitled Sawyer *vs.* Northern Pacific R. R. Co., as published in vol. 12 of the Decisions of the
119 Department of the Interior Relating to Public Lands, on page 448 and following pages, shall be considered and is hereby introduced as evidence in this case.

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists, as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections on record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of loss, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist for which indemnity is allowed by law,

the lieu selections must be made from vacant, unappropriated land within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved:

"L. Q. C. LAMAR, *Secretary.*"

120 That on October 12, 1887, the Northern Pacific Railroad Company filed in said United States district land office at Fargo a list designating an amount of lands equal to those selected in said list of March 19, 1883, claimed to have been lost and excepted from said grant and within the place limits of said grant, as defined on definite location and as a basis for said selections.

That the decision of acting Secretary Chandler, of the Interior Department, dated June 10th, 1891, in the case of St. Paul, Minneapolis & Manitoba R'y Co. and St. Paul and Northern Pacific R. R. Co., published in vol. 13 of the Decisions of the Department of the Interior Relating to Public Lands, on page 349 and following pages, shall be considered, and is hereby, introduced in evidence in this case.

That thereafter, on February 23, 1892, the said Northern Pacific Railroad Company duly filed in said United States district land office at Fargo a rearranged list in which it designated the lands theretofore selected, as aforesaid, in said list filed March 19, 1883, and therein set opposite each specific description of land so selected the description of a tract of equal area lost from its grant in place, and in lieu of which such indemnity lands had been selected, and therein set opposite the said northeast quarter of section 13, township 132, range 57, and as a basis for the selection of the same the southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin; that said last-described tract was coterminous with and within twenty miles of the portion of said line of said Northern Pacific railroad, as definitely fixed, extending through the State of Wisconsin, and was at the date of the grant to the Northern Pacific Railroad Company and at the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof

121 filed in the office of the Commissioner of the General Land Office, as aforesaid, reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved July 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and was at the date of said act of June 3, 1856, and at the time of the definite location of the road, in aid of which said act was passed, public land and free from pre-emption and other claims and rights, and that the railroad provided for by said act of June 3, 1856, was definitely located prior to the definite location of the Northern Pacific railroad in Wisconsin; that at the date of said selection by said company of said northeast quarter of section thirteen, township 132, range 57, there were no filings or entries or applications to make

filing or entry for said tract other than the filing and entry of said plaintiff as herein set forth; that said selection has never been approved by the Secretary of the Interior, except as herein set forth, and neither the Department of the Interior nor the Secretary of the Interior nor any department of the Government has ever made certification that the said company was entitled to the same or to letters patent for the same, but was cancelled by said Secretary in his decision set out in the ninth paragraph hereof; that, except as herein set forth, letters patent or any evidence of title whatsoever for said tract has never been issued or made to said company or to any person or persons whomsoever except to this plaintiff.

8. That under date of May 2, 1896, the Commissioner of the General Land Office made the following certificate, to wit:

"I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that I have caused examination to be made of records of this office relative to the grant to the Northern
122 Pacific Railroad Company, under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of lands excepted and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres, which are, or will be when surveyed, available for the selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant, which cannot be satisfied from the limits as now recognized by this office.

"(Signed) S. W. LAMOREUX,
"*Commissioner.*"

9. That the said southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin, so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57 west, lies east of Superior city, in the State of Wisconsin; that on November 14, 1895, the Secretary of the Interior rendered a decision wherein he held that said act of Congress of July 2, 1864, and the acts supplemental thereto and amendatory thereof did not grant to said Northern Pacific Railroad Company any lands east of Superior city, in the State of Wisconsin, and that said company is not entitled under said acts or any of them to take lands east of Superior city; that said Secretary in said decision further ruled as follows:

"I further learn, upon inquiry at your office, that the lands east of Superior city were made the basis of the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have perhaps been sold by the company.

"The previous action of this department giving color to
123 the company's right to a grant east of Superior city and the application of the rule that the indemnity lands should be selected nearest to those lost were the probable causes for the specification of these lands as a basis for the selections referred to.

"In view thereof I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections where the charge is that the basis was made lands east of Superior city, or application to enter under the settlement laws will be received."

That within sixty days from the notice of said decision and on November 26, 1895, the said railroad company, in compliance with said order, specified as a basis for its said selection of the said northeast quarter section 13, township 132 — of range 57, the northeast quarter of section 1, in township 3 north of range 33, in the State of Montana, and duly filed said specification on said date in the office of the Commissioner of the General Land Office in accordance with the said direction of the Secretary of the Interior; that said last-described tract was, at the date of said grant to said company and at the date of the definite location of its line of railroad opposite thereto, within the Crow Indian reservation; that said tract was, at the date of said grant and of said definite location, within forty miles of the line of said railroad as definitely located through said State, then Territory, of Montana; that in so assigning said tract as a basis for said selection said railroad company, by its land commissioner, William H. Phipps, filed therewith in the office of said commissioner the following statement, to wit:

"Whereas the honorable Secretary of the Interior did on
124 the fourteenth day of November, 1895, render a decision wherein he held that the Northern Pacific Railroad Company had no grant of lands opposite to and coterminous with its railroad between Superior and Ashland, and that therefore the designation of losses between those points as a basis for the selection of indemnity land elsewhere was invalid; and

"Whereas the Secretary of the Interior in said decision of November fourteenth, 1895, did direct that the said Northern Pacific Railroad Company be allowed sixty days from notice of said decision within which to designate other losses within its said grant in lieu of those within the points theretofore assigned; and

"Whereas the Northern Pacific Railroad Company has heretofore sold a large portion of its indemnity lands, the title to which is affected by the decision of the Secretary of the Interior of November fourteenth, 1895, hereinbefore referred to:

"Now, therefore, the said Northern Pacific Railroad Company, because of said decision of the Secretary of the Interior and to facilitate the adjustment of the title to said indemnity lands so affected by said decision, reserving and saving all rights of the company heretofore acquired and expressly maintaining and insisting that all provisions of the act of July 2, 1864, for its benefit are in all respects in full force and operation as far east as Ashland, the Northern Pacific Railroad Company, for the sole purpose of protecting and saving the titles of its purchasers to indemnity lands affected by the decision of the Secretary of the Interior of Novem-

ber fourteenth, 1895, hereby submits, pursuant to the directions of said decision, a list of losses to be substituted for those heretofore embraced in Fargo list No. 6 as originally filed on March 19, 1883, and rearranged February 23rd, 1892.

"And the said company prays the approval of said amended
125 list and the prompt issuance of patent therefor.

"WM. H. PHIPPS,

"*Land Commissioner N. P. R. R. Co.*"

That said tract so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57, was excepted from said grant to said company by reason of being included in said Indian reservation, and said company was entitled to select indemnity therefor.

That on or about the 10th day of April, 1882, plaintiff, being qualified to hold and acquire land under the pre-emption laws of the United States, settled upon and improved the said northeast quarter of section thirteen, in township one hundred and thirty-two north of range fifty-seven west of the fifth principal meridian, in the county of Sargent, State of North Dakota, then the Territory of Dakota, with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States by the citizens thereof and those who have declared their intention to become such citizens, and that on the 2nd day of November, 1882, he duly presented to the United States land office at Fargo, Dakota Territory (now State of North Dakota), a declaratory statement, No. 11747, for said tract, as provided by law, which was duly received, filed, and placed upon the records of the said land office.

10. That plaintiff resided upon and cultivated said land, as required by law, from the said 10th day of April, 1882, to the 4th day of April, 1883, at which latter date he submitted final proof therefor, as provided by law, and then and there duly tendered the Government price for said tract, together with all the required fees, to the said land office, and that said final proof was then and there
126 rejected by the register and receiver of the United States district land office, assigning as a reason therefor that the described land had been withdrawn from entry under the said act of July 2, 1864, and the acts of Congress supplemental thereto and amendatory thereof; that plaintiff duly appealed from the said decision of the district land office to the Commissioner of the General Land Office, who on the 5th day of October, 1883, affirmed the decision of the district land office; that the plaintiff had no notice whatsoever of the said decision of October, 1883, until on or about the 1st day of August, 1888, at which date he made application for a review thereof by the Commissioner of the General Land Office, and thereupon that officer, on the 25th day of September, 1888, rendered the following decision, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Sept.* 25, 1888.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of October 5, 1883, affirming your action in rejecting his final proof for N. E. ¼ section 15, town 132 N., range 57 W.

"Said tract is within the fifty-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific R. R. Co. ordered by letter from this office dated June 11, 1873, received at the local office, then at Pembina, June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th day of October following. The whole of said section was selected by the agent of the railroad company March 19, 1883, per list No. 6.

"The records here show that Hewitt presented his final pre-
emption proof at your office, which was rejected for conflict
127 with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over 21 years of age, and a qualified pre-emptor July 10th, 1882; his improvements consisted of a frame house 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior, in the case of The Northern Pacific R. R. Co. *vs.* Guilford Miller, it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the 6th section of the granting act and, being in violation of the law, was without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States, who settled on lands within such limits prior to the time when selection by the railroad had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision and
128 that 60 days will be allowed for appeal.

"The resident attorneys for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"*Commissioner.*"

That the said case of Northern Pacific Railroad Company *vs.* Guilford Miller and the report thereof shall be considered to be evidence herein and may be considered by the court.

That thereafter the said Northern Pacific Railroad Company duly appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior on August 11, 1894, made and rendered his certain decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

"The Commissioner of the General Land Office.

"SIR: I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼ sec. 13, T. 132 N., R. 57 west, Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing, upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D., —), and your office decision is therefore affirmed
129 and the company's selection will be canceled. Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That the said case of Northern Pacific R. R. Co. *vs.* Davis (Davis vs. N. P. R. R. Co.) and the report thereof shall be considered to be in evidence herein and may be considered by the court.

That on June 22, 1895, pursuant to said decision of the Secretary of August 11, 1894, and based upon said pre-emption final proof so made, as aforesaid, by said plaintiff, letters patent of the United States were duly issued under the great seal of the United States, purporting to convey to said plaintiff the said northeast quarter of section 13, township 132 of range 57, North Dakota.

11. That from the said 10th day of April, 1882, to the 21st day of June, 1884, plaintiff resided upon and was in the actual possession of said tract and every portion thereof and had valuable improvements thereon.

12. That on June 21, 1884, and while plaintiff was so in possession of said land the said defendant, Emil Schultz, made and entered

into a certain contract in writing with the said railroad company, by the terms whereof said railroad company agreed, in consideration of twelve hundred dollars ($1,200), to sell and convey the said northeast quarter of section 13, township 132, range 57, to the said defendant, Emil Schultz, and the said Emil Schultz then and therein agreed to purchase the said land from the said company and to pay to said company the said sum therefor; that upon the making of said contract the said Emil Schultz entered upon said tract and ousted said plaintiff from the actual possession thereof and took up his residence thereon, and has since continued
130 to reside thereon and cultivate and improve the same; that the said defendant, Schultz, having paid to the said railroad company the consideration agreed by him to be paid to said company for said land in said contract of sale, as aforesaid, the said company, on or about December 18, 1889, made, executed, and delivered its certain indenture of deed, with full covenant of warranty, whereby it conveyed to the said defendant, Schultz, the said northeast quarter of section 13, in township 132 north of range 57 west.

13. The plaintiff has not at any time made a conveyance or attempted conveyance of said premises, but now holds any and all title thereto which he may have received from the United States, as hereinafter set forth.

The said defendant, Schultz, has not at any time made a conveyance or attempted conveyance of the said premises, but now holds any and all title thereto which he may have received from the said Northern Pacific Railroad Company by virtue of the said contract and deed.

14. That the value of the rents, issues, and profits of said tract during the time of its occupancy by said Schultz, as aforesaid, is the sum of seven hundred and fifty (750) dollars.

15. That the value of the improvements made upon said tract by said defendant, Schultz, is the sum of six hundred (600) dollars, and the value of the land without the improvements is the sum of eight hundred (800) dollars.

16. That the said defendant Frederika Schultz is the wife of the said defendant Emil Schultz.

17. That none of the buildings or improvements made or placed upon the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred thirty-two (132) north of range fifty-seven (57) west, by the defendants or either of them were made or placed thereupon while the
131 defendants or either of them were holding under color of title adversely to the claim of plaintiff in good faith.

18. That if the plaintiff in this action shall prevail the defendants and each of them hereby waive all claim or right of recovery against plaintiff by counter-claim or otherwise for the value of said buildings and improvements or either or any of them, and consent and agree that proper findings in accordance with this stipulation may be made and judgment and decree based thereon may be entered accordingly in this action.

19. That the tract of land involved in the action entitled Grandin *vs.* La Bar, as reported in 57 N. W. Rep., 241, and the pages following, was selected by the said Northern Pacific Railroad Company at the same time and included in the same list of selections as the tract involved in this action, and the foregoing certificate, dated April 9th, 1883, on pages 8 and 9, is appended to the said list of selections, included in which list is the tract involved in the case of Grandin *vs.* La Bar aforesaid.

20. That either party to this action may submit other or further evidence in this action.

THOMAS A. CURTIS,
PIERCE & AUSTIN,
Attorneys for Plaintiff.
BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

And thereupon the said case was presented and argued before the said court and duly taken under advisement, and thereafter, as appears by the record herein, the court made and filed its findings of fact and conclusions of law, and thereupon the said defend-
132 ants, by their attorneys, duly appeared and submitted exceptions to said findings of fact and conclusions of law, which were and are hereby allowed, the said exceptions so filed and allowed being in the words and figures following, to wit:

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Now comes the defendants, by their attorneys, Ball, Watson & Maclay, James B. Kerr, and J. B. McNamee, and except to all the findings of fact and conclusions of law herein for the reason and upon the ground that said findings of fact and conclusions of law were prepared by the attorney for the plaintiff and signed by the court without notice to the attorneys for said defendants and without a submission to said defendants of a copy thereof or a copy of the proposed findings of fact prior to the signing thereof.

Defendants further except to the first conclusion of law on the ground that the same is not sustained by the evidence or the findings of fact therein.

Defendants except to the second conclusion of law on the ground that the same is not sustained by the evidence and the findings of fact therein.

Defendants in like manner except to the third conclusion of law upon the ground and for the reason that the same is not sustained by the evidence or the findings therein, and is contrary to the findings and contrary to the evidence.

Defendants in like manner except to the fourth conclusion of law upon the ground that the same is not sustained by the evidence or

findings herein, and that the same is contrary to law and
133 contrary to the evidence and contrary to the findings herein.

Defendants in like manner except to the fifth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the sixth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the seventh conclusion of law, upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

And thereafter the defendants, by their attorneys, duly presented and filed certain specifications of error in the words and figures following, to wit:

"FRED HEWITT, Plaintiff,
vs.
"EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

"*Specification of Errors.*

"Defendants specify the following errors herein:

1. "The court erred in holding and deciding that the plaintiff was the owner in fee-simple of the land in controversy, to wit, the northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, North Dakota.

2. "The court erred in holding and deciding that the
134 defendants had no estate, interest, right, or title in or to said premises.

3. "The court erred in holding and deciding that the order of withdrawal made by the acting Commissioner of the General Land Office on June 11, 1873, was made in violation of law and was without effect and void in so far as it relates to the land in controversy.

4. "The court erred in holding and deciding that the Northern Pacific Railroad Company never made a valid selection of the land in controversy for indemnity purposes.

5. "The court erred in holding and deciding that the defendants wrongfully and unlawfully withheld the possession of said premises from the plaintiff, and that the plaintiff is entitled to the possession of the said premises.

6. "The court erred in holding and deciding that the plaintiff is entitled to judgment against the defendants for the sum of seven hundred and fifty (750) dollars, or any sum, for the rents, issues, and profits of said premises.

7. "The court erred in failing and refusing to hold and decide that the defendants are the equitable owners of said premises and the whole thereof.

8. "The court erred in failing and refusing to hold and decide that

the Northern Pacific Railroad Company made a valid selection of said premises as indemnity under the act of Congress of July 2, 1864.

9. "The court erred in failing and refusing to hold and decide that the land in question was withdrawn from pre-emption and homestead entry by virtue of section six of the act of Congress approved July 2, 1864, from and after the filing of the map of general route coterminous with said premises on the 30th day of March, 1872.

10. "The court erred in failing and refusing to hold and
135 decide that the said premises were withdrawn from pre-emption and homestead entry by virtue of the order of the Commissioner of the General Land Office dated June 11, 1873, from and after June 24, 1873, when said order was received at said district and office, at Pembina, Dakota Territory.

11. "The court erred in failing and refusing to hold and decide that the patent of the plaintiff is null and void.

12. "The court erred in ordering judgment against the defendants for costs.

"BALL, WATSON & MACLAY,
"JAMES B. KERR,
"J. B. McNAMEE,
"*Attorneys for Defendants.*"

STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

I, W. S. Lauder, judge of the district court in and for the fourth judicial district, before whom the above-entitled case was tried, do hereby certify that the foregoing is a complete statement of said case; that it contains all the evidence submitted at the trial thereof and all the exceptions taken by said parties and allowed; that the said statement is correct, and to the end that it may be made of record in the case it is hereby settled.

By the court:

W. S. LAUDER, *Judge.*

Feb'y 8th, 1898.

136 STATE OF NORTH DAKOTA, }
County of Sargent. }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Notice of Appeal.

To T. A. Curtis, Esq., and Messrs. Pierce & Austin, attorneys for the above-named plaintiff:

Please take notice that the defendants above named appeal to the supreme court of the State of North Dakota from the judgment heretofore rendered in this action and from the whole thereof.

Dated February 17th, 1898.

BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

STATE OF NORTH DAKOTA, }
County of Sargent. }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Whereas, on the 31st day of January, 1898, in the district court within and for the county of Sargent, State of North Dakota,
137 the above-named plaintiff obtained judgment against the above-named defendants; and

Whereas the above-named defendants, feeling aggrieved thereby, intend to appeal from said judgment to the supreme court of the State of North Dakota:

Now, therefore, we do hereby undertake that the said defendants and appellants will pay all costs and damages which may be awarded against them on said appeal not exceeding the sum of $250.

Dated February 17th, 1898.

EMIL SCHULTZ AND
FREDERIKA SCHULTZ,
By BALL, WATSON & MACLAY,
Their Attorneys.

ALEX. STERN.
MAURICE KAUFMANN.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

On this 17th day of February, 1898, before me, a notary public within and for said county and State, personally appeared Alex. Stern and Maurice Kaufman, known to me to be the same persons who are described in and who executed the foregoing instrument, and acknowledged to me that they executed the same; and each of them, duly sworn, says each for himself that he is one of the sureties above named, and that he is worth the sum of $250, specified in the foregoing undertaking, in property situated in the
138 State of North Dakota over and above his debts and liabilities and exclusive of his property exempt from execution.

ALEX. STERN.
MAURICE KAUFMAN.

Subscribed and sworn to before me this 17th day of February, 1898.

D. G. MACLAY,
[SEAL.] *Notary Public, Cass County, North Dakota.*

139 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTS, Defendants. }

Specification of Errors.

Defendants specify the following errors herein:

1.

The said court erred in holding and deciding that the plaintiff was the owner in fee of the land in controversy, to wit, the northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, North Dakota.

2.

The court erred in holding and deciding that the defendants had no estate, interest, right, or title in or to said premises.

3.

The court erred in holding and deciding that the order of withdrawal made by the acting Commissioner of the General Land Office on June 11, 1873, was made in violation of law and was without effect and void in so far as it relates to the land in controversy.

4.

The court erred in holding and deciding that the Northern Pacific

Railroad Company never made a valid selection of the land in controversy for indemnity purposes.

5.

The court erred in holding and deciding that the defendants wrongfully and unlawfully withhold the possession of said premises from the plaintiff, and that the plaintiff is entitled to the
140 possession of the said premises.

6.

The court erred in holding and deciding that the plaintiff is entitled to judgment against the defendants for the sum of seven hundred and fifty (750) dollars, or any sum, for the rents, issues, and profits of said premises.

7.

The court erred in failing and refusing to hold and decide that the defendants are the equitable owners of said premises and the whole thereof.

8.

The court erred in failing and refusing to hold and decide that the Northern Pacific Railroad Company made a valid selection of said premises as indemnity under the act of Congress of July 2, 1864.

9.

The court erred in failing and refusing to hold and decide that the land in question was withdrawn from pre-emption and homestead entry by virtue of section six of the act of Congress approved July 2, 1864, from and after the filing of the map of general route coterminous with said premises on the 30th day of March, 1872.

10.

The court erred in failing and refusing to hold and decide that the said premises were withdrawn from pre-emption and homestead entry by virtue of the order of the Commissioner of the General Land Office, dated June 11, 1873, from and after June 24, 1873, when said order was received at said district land office at Pembina, Dakota Territory.

11.

The court erred in failing and refusing to hold and decide that the patent of the plaintiff is null and void.

141 12.

The court erred in ordering judgment against the defendants for costs.

BALL, WATSON & MACLAY,
JAMES B. KERR, AND
J. B. McNAMEE,
Attorneys for Defendants.

142 On the 13th day of May, 1898, the said appeal was duly argued before the said supreme court of the State of North Dakota, as more fully appears from the minutes of said court; which minute record is in words and figures as following, to wit:

Supreme Court of the State of North Dakota.

Term Minutes, April Term, A. D. 1898.

FRIDAY, *May 13th*, 1898.

Pursuant to adjournment, court convened at 10 a. m., all the judges and officers of the court being present.

Now the court called for argument.

File No. 562.

FRED HEWITT, Respondent,
vs.
EMIL SCHULTZ ET AL., Appellants.

Appearances: For the appellants, Ball, Watson & Maclay and James B. Kerr; *contra*, Pierce & Austin.

Case argued, submitted to the court, and taken under advisement.

143 On the 27th day of May, A. D. 1898, the judgment of the said supreme court of the State of North Dakota was duly entered; which judgment is in words and figures following, to wit:

STATE OF NORTH DAKOTA, *ss*:

In the Supreme Court.

File No. 562.

FRED HEWITT, Plaintiff and Respondent,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants and Appellants.

Appeal from the district court of Sargent county.

This action coming on to be heard at the April, 1898, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota—present, Guy C. H. Corliss, chief justice; J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by Ball, Watson & Maclay and James B. Kerr for the appellants, and by Pierce & Austin for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Sargent county, appealed from herein, be, and the same is hereby, reversed and the district court is directed to dismiss the action.

And it is further ordered that this cause be, and it is hereby,

remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that appellants have and recover of the respondent costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

144 Dated May 27, 1898.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:

[SEAL.] R. D. HOSKINS, *Clerk.*

145 On the said 27th day of May, 1898, the written opinion of the said the supreme court of the State of North Dakota was filed; which opinion is in the following words and figures, to wit:

In the Supreme Court, State of North Dakota, April Term, 1898.

FRED HEWITT, Respondent,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Appellants.

Congress did not take from the Land Department the power of withdrawal with respect to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company.

Accordingly, held that a patent based upon an entry of land within such limits after the withdrawal thereof by the acting Commissioner of the General Land Office was void.

(Syllabus by the court.)

Appeal from the district court of Sargent county, W. S. Lauder, judge.

Ball, Watson & Maclay, James B. Kerr, and J. B. McNamee, for appellants; Pierce & Austin and T. A. Curtis, for respondent.

CORLISS, *C. J.*:

The plaintiff has brought ejectment to recover from the grantees of the Northern Pacific Railroad Co. the possession of a quarter section of land situated within the indemnity belt of the land grant of that corporation. His pre-emption settlement upon the land

146 was made after the same had been withdrawn from entry by the acting Commissioner of the General Land Office. Following certain rulings of the Land Department that the withdrawal was void, the Secretary of the Interior, affirming the decision of the Commissioner, held that, despite such withdrawal, the plaintiff's final proof should be received, and thereafter a patent was issued to him. The defendants attack the validity of this patent, claiming that it is absolutely void, because the entry was made upon lands which were, on account of the withdrawal, no longer open to entry. They predicate this contention upon the proposition that the withdrawal referred to was legal and operated to place the land in ques-

tion beyond the reach of private settlement. That the patent is void if the position taken by defendants be sound would not seem to admit of doubt; nor is the point seriously contested by counsel for plaintiff. If the withdrawal was valid, then the land was land included within a reservation by the proclamation of the President, was distinctly held in Wolsey *vs.* Chapman, 101 U. S., 755. Where the land entered is not subject to entry the patent is void. Burfenning *vs.* Railroad Company, 163 U. S., 321. We are therefore brought face to face with the question, the crucial question in the case, whether, in view of the peculiar provisions of the land grant to the Northern Pacific Railroad Co., the executive branch of the Government had any authority to withdraw from entry any of the lands within the indemnity belt of such grant. It is essential to an intelligent discussion of this question that we should quote two sections of this granting act—sections three and six. Section three declares: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast,

* * * every alternate section of public land not mineral,

147 designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by the company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

Section six provides: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting

148 those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a

less price than two dollars and fifty cents per acre when offered for sale."

In construing these enactments we must keep steadily in mind the fact that Congress well knew that the power of withdrawal was vested in the executive branch of the Government. See Wadeing *vs.* Des Moines Co., 5 Wall., 687; Wolsey *vs.* Chapman, 101 U. S., 755; Riley *vs.* Wells, 154 U. S., 578; Spencer *vs.* McDougal, 159 U. S., 62; Northern Pacific Railroad Co. *vs.* Missoula Country Co., 18 Sup. Ct. Rep., 206. Secretary Vilas, in his opinion in the Miller case, 7 L. D., 100, holds that section six, both by implication and by express provision, takes from the executive branch of the Government the well-recognized and frequently exercised power of withdrawal with respect to land within the indemnity limits of the grant contained in the statute. We fail to discover any force in his reasoning upon either point. So far from the first portion of the section creating an implication that no power of withdrawal should ever be exercised by the officers of the Land Department or by the President, we think that the implication is exactly the reverse. Why did Congress embody in that section the provision that after the general route should be fixed the odd sections should not be liable to entry, etc.? The reason is perfectly obvious when we turn back to section three and examine its provisions in connection with those of section six. Two distinct acts were to be performed by the corporation in securing title under this grant. It must first fix its general route. Subsequently it must file its map of definite location. Between these two periods, which might be separated by years of time, settlers would naturally be attracted to the land along such general route, and the company might find by the time its map of definite location was filed that so numerous were the
149 settlements upon the lands embraced within the grant that the value of the grant had been seriously impaired. Under section three the company must take the land subject to all entries upon the odd sections made prior to the filing of the map of definite location, and therefore subject to all entries intermediate the fixing of the general route and the filing of such map. Congress plainly saw that unless settlement during this period was prevented an extraordinary influx of population might so reduce the acreage of the grant that the indemnity land would not suffice as a means of adequate indemnity. There was power, it was true, in the officers of the Land Department to withdraw for settlement this land within the place limits after the general route had been fixed; but the hazard to the company was deemed too great to leave in a state of uncertainty—to entrust to the discretion of a public official—that which could be easily settled in the law itself, and accordingly, to preclude all possibility of a great tide of immigration engulfing and sweeping away much of the grant which it was intended the company should enjoy, Congress itself erected the dyke which was to keep out this anticipated flood. It is strange, indeed, that such a precaution should ever have been thought by a rational mind to indicate by implication a legislative purpose to take from the Land

Department the conceded power of that department to extend to the company within the indemnity limits a similar protection in case of need. The feature of this grant to the Northern Pacific Railroad Co. which stands out in bold relief is the purpose of the Federal Government to give to the company as an equivalent for the tremendous financial hazard of constructing a great railway system through a vast stretch of unsettled territory and over almost impassible mountains a grant of land which in any event should equal in area the amount it would receive were every odd
150 section specified in the grant free from claim at the time its map of definite location should be filed. Congress intended that the grant should be in substance a grant in quantity, and, to the end that it might keep its word of promise to the hope as well as to the ear, it carefully guarded against the material diminution of the acreage of the grant by settlements intervening between the time when the company should file its map of general route and the time when it should file its map of definite location. We would little expect from such legislation to find the same body in one and the same breath taking from the Land Department the old and often-exercised power of withdrawal, when to do so would subject the grantee to the hazard of losing a portion of its grant—the very hazard from which such body had so carefully guarded the grantee in the preceding sentence. Why in this particular case such power should be withheld it is impossible to discover. If Congress intended in good faith to see to it that the full grant should ultimately accrue to the company, it is incredible that it should without any explicable reason therefor take from the Land Department a power so necessary to the accomplishment of that purpose as the power of withdrawal. Even if the statute were not clear in meaning, it would be disgracefully derogatory to the honor of the United States to assume that in a covert way Congress intended to impair the value of the grant by enacting in the disguise of ambiguous language that the Land Department should not be permitted to defend the grant by the exercise of the well-known power of withdrawal. It is not difficult to ascertain why the last clause of section six was passed. In 1862, two years before the grant to the Northern Pacific Railroad Company, Congress had extended the pre-emption rights to unsurveyed lands. 12 Stat., 413. It readily saw that the moment the general route was fixed a strong current of
151 population might and probably would flow in the direction of the adjoining lands within the place and the indemnity limits, practically all of which lands were unsurveyed. Under the act of 1862 these settlements would be good, although upon unsurveyed lands, provided they were not made upon odd sections within the place limits. In the indemnity belt they would all be good without reference to the number of the section; thus it might happen that long before the lands could be surveyed, and therefore long before the time could arrive when the company would know what losses it had sustained by reason of prior settlements and in other ways, and therefore be in position to make selections, this fund of real estate, out of which these losses were to be made good,

would be wrested from the company by prior pre-emption entries. Congress plainly saw that it would be unjust to the company to leave the general provision of the act of 1862, that a pre-emptor could initiate his rights on unsurveyed land, in force as to the indemnity lands, and hence it declared in terms that those provisions should apply only after the land had been surveyed; therefore under ordinary circumstances the company could protect itself, as it would, as a rule, make its selections before private settlements could be made; but in the event that a withdrawal should at any time become necessary the power of withdrawal was, we are clear, to be exercised as in other cases. For other reasons, equally forcible to the mind of the statesman, Congress placed all lands (except the odd sections in the place limits, which were withdrawn absolutely, whether surveyed or not) in the same category. The odd sections in the indemnity limits were not to be open to settlement until surveyed, that the company might be protected, and the other sections in both limits were not to be open to settlement, that the settlers themselves might be protected. It would certainly
152 be an unwise policy to tempt people upon unsurveyed lands with the inevitable risk of finding in many cases after survey that the- had settled upon property belonging to the railroad company—*i. e.*, odd sections within the place limits—and which, therefore, they could not hold. When we bring to the interpretation of this law a spirit large enough for the task and do not spend our ingenuity in an endeavor to force into it some hidden meaning we find no difficulty in discovering that Congress never dreampt of taking away the power of withdrawal. We read in every line of the statute an unmistakeable purpose to surround the interests of the company with every possible safeguard against the impairment of the grant on the faith of which it was known that large investments of capital would be risked. Had Congress in terms declared that the power of withdrawal should never be exercised as to the indemnity lands, the grant would probably never have been accepted. We do not believe that the capitalists who embarked their money in this enterprise ever believed that this power whose exercise might become essential to the protection of the integrity of the grant had been taken away. Where is the language to create such a belief? It is not to be found. Had so radical a change in national policy with respect to public lands been determined upon this particular case the phraseology of the act on this point would have been explicit. Secretary Vilas has by ignoring the general spirit of the act and other legislation, which throws light upon its interpretation, forced into the law a meaning neither expressed nor implied, one which presupposes that Congress intended without any reason for so doing to depart from an established practice when there was every reason why it should adhere thereto. Going back in imagination to the time when this law was framed and taking up our position alongside of the members of the committee whose duty it was to draft it and bringing to bear upon the question the large
153 views of true statesmanship, looking to every consideration which should be weighed, it seems to us, in the light of the

language of the statute, that the train of reasoning which passed through the minds of that committee lies upon the very surface. "We desire that the company shall lose none of its grant; therefore we will not allow it to be subject to losses in the place limits after the general route is fixed, and therefore we will not permit settlement within the indemnity belt until the lands are surveyed, when the company can for the first time have an opportunity to make selections for losses, and therefore, in conclusion, we will not take away the power of withdrawal as to the indemnity lands; which power may be found indispensible to the full protection of the grant in all its integrity."

Contemporaneous construction of this law by the officers of the Land Department is in harmony with our views. Down to the time of the decision made by Secretary Vilas the whole trend of opinion was in the opposite direction. More than forty withdrawals of indemnity land had at that time been made. The construction of the law by those who are charged with the duty of executing it has often been deemed very persuasive. U. S. *vs.* Moore, 95 U. S., 763; U. S. *vs.* Pugh, 99 U. S., 289; U. S. *vs.* McDaniel, 7 Pet., 1; Railroad Company *vs.* Barnes, 2 N. D., 383; U. S. *vs.* Johnson, 124 U. S., 236; U. S. *vs.* Philbrick, 120 U. S., 52. The spirit of the law, the letter of the law, long continued contemporaneous construction of the law by the officers of the Land Department, the failure of Congress to check by a specific enactment this constant practice of making such withdrawals, and finally the manifest reason and justice of the case, coupled with the impossibility of discovering any ground for taking the land in the indemnity belt of this grant out of the universal rule—these all combine to make a conclusive case against the decision of Secretary Vilas that the power of
154 withdrawal was taken away. Our conclusion, therefore, is that the withdrawal was legal, and that therefore the plaintiff's patent is void. It follows that he cannot maintain this action, as he must recover on the strength of his own title. The judgment of the district court is reversed, and that court is directed to dismiss the action.

All concur.

GUY C. H. CORLISS.
J. M. BARTHOLOMEW.
ALFRED WALLIN.

155 On the 23rd of January, 1899, there was filed in said court a petition for a writ of error; which petition is in words and figures as follows, to wit:

STATE OF NORTH DAKOTA:

In the Supreme Court.

FRED HEWITT, Plaintiff in Error,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants in Error.

Now comes the above-named Fred Hewitt, plaintiff in error, and prays that the writ of error in the above-entitled cause may issue to the said supreme court for the State of North Dakota to review a certain judgment entered in said court on the 27th day of May, 1898, in favor of the said Emil Schultz and Friederika Schultz, defendants in error, and against the said Fred Hewitt, plaintiff in error, and dismissing the complaint and action of the said Fred Hewitt, plaintiff in error, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of North Dakota, to the great damage of said plaintiff in error; all of which will more in detail appear from the assignment of errors which is filed with this petition.

FRED HEWITT,
Plaintiff in Error,
By JAMES A. KELLOGG,
His Attorney.

Dated December 17th, 1898.

156 On the 23rd of January, 1899, there was filed in said court assignments of error; which assignments of error are in words and figures as follows, to wit:

STATE OF NORTH DAKOTA:

In the Supreme Court.

FRED HEWITT, Plaintiff in Error,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants in Error.

Assignments of Error.

Comes the said Fred Hewitt, plaintiff in error, appellant, by James A. Kellogg, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

The said court erred in holding and deciding that Congress did not take from the Land Department the power of withdrawal with respect to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company.

II.

The court erred in holding and deciding that the land in controversy was withdrawn from the pre-emption and homestead entry by

virtue of the withdrawal order of the acting Commissioner of the General Land Office, dated June 11th, 1873.

III.

The court erred in refusing to hold and decide that the said alleged withdrawal of the said indemnity lands by the acting Commissioner of the General Land Office was prohibited by the act of Congress of July 2nd, 1864, and without authority of law and void.

IV.

That the court erred in refusing to hold and decide that
157 the order of withdrawal made by the acting Commissioner of the General Land Office on June 11th, 1873, was made in violation of law, and was without effect and void in so far as it relates to the premises in controversy.

V.

The court erred in holding and deciding that said premises were not subject to entry under the pre-emption and homestead laws of the United States.

VI.

The court erred in holding and deciding that the Northern Pacific Railroad Company made a valid selection of the premises under the act of Congress of July 2nd, 1864.

VII.

The court erred in refusing to hold and decide that the Northern Pacific Railroad Company never made a valid selection of the premises for indemnity purposes.

VIII.

The court erred in refusing to hold and decide that the plaintiff in error was not the owner in fee of the premises.

IX.

The court erred in refusing to hold and decide that defendants in error had no estate, right, or title in or to the premises.

X.

The court erred in holding the patent for said premises issued to plaintiff in error was void.

XI.

The court erred in refusing to hold and decide that the defendants in error wrongfully and unlawfully withhold possession of said premises from plaintiff in error, and in refusing to hold and decide that plaintiff in error was entitled to judgment against de-
158 fendants in error for the rents, issues, and profits of said premises.

Wherefore the said Fred Hewitt, the plaintiff in error, prays that the order and judgment of the supreme court of the State of North Dakota be reversed and the said supreme court be ordered to enter an order affirming in all things the decision and judgment of the trial court.

JAMES A. KELLOGG,
Attorney for Plaintiff in Error.

159 On the 23rd of January, 1899, there was filed in said court an undertaking on appeal or writ of error; which undertaking is in words and figures as follows, to wit:

Know all men by these presents that we, Fred Hewitt, as principal, and S. J. Vidger and Alex. Stern, as sureties, are firmly bound unto Emil Schultz and Friederika Schultz in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said Emil Schultz and Friederika Schultz, their successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our hands and dated this 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, in the supreme court of the State of North Dakota, in a suit pending in said court between Fred Hewitt, plaintiff, and Emil Schultz and Friederika Schultz, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and the citation directed to the said Emil Schultz and Friederika Schultz, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, on or before the 10th day of March, 1899:

Now, the condition of the above obligation is such that if the said Fred Hewitt shall prosecute the said writ of error to effect and answer all damages and costs if *it* shall fail to make *its* plea
160 good, then the above obligation to be void; otherwise to remain in full force and virtue.

FRED HEWITT, [SEAL.]
By JAMES A. KELLOGG,
His Attorney.
S. J. VIDGER. [SEAL.]
ALEX. STERN. [SEAL.]

Sealed and delivered in presence of—
C. D. AUSTIN.
A. W. McCLAIAN.
D. G. MACLAY.

Approved by—
J. M. BARTHOLOMEW,
Chief Justice of Supreme Court, State of North Dakota.

161 STATE OF NORTH DAKOTA, } ss:
In the Supreme Court, }

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance *to* the mandate of the writ of error heretofore attached, wherein Fred Hewitt is plaintiff in error and Emil Schultz and Friederika Schultz are defendants in error, do hereby certify that the above and foregoing, being pages numbered from one (1) to one hundred and sixty (160), inclusive, are full, true, correct, and complete copies of the original record on appeal from the district court of the county of Sargent, in the State of North Dakota, of the minutes of the said supreme court of the State of North Dakota, the judgment and opinion of said court, petition for writ of error, assignments of error, and undertaking in the said action, and the same are transmitted to the Supreme Court of the United States pursuant to said writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of the State of North Dakota, at Bismarck, this 7th day of March, A. D. 1899.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of North Dakota.

Endorsed on cover: File No., 17,336. North Dakota supreme court. Term No., 241. Fred Hewitt, plaintiff in error, *vs.* Emil Schultz & Friederika Schultz. Filed March 28th, 1899.